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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

AMERICAN BOILER MANUFACTURERS ASSOCIATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL UNION 455 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Petitioner, American Boiler Manufacturers Association ("ABMA"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 30, 1968.

OPINIONS BELOW

This case was before the Court of Appeals on two occasions. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 23-38), which is the subject of this pe-

tition, was entered on December 6, 1968, and is reported at 404 F.2d 547. The first opinion of the Court of Appeals (Appendix E, *infra*, pp. 62-74) was entered on October 6, 1966, and is reported at 366 F.2d 815. The Board's original Decision and Order (Appendix D, *infra*, pp. 42-61) are reported at 154 NLRB 285. The Board's Supplemental Decision and Order (Appendix F, *infra*, pp. 75-85), are reported at 167 NLRB No. 79.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, pp. 39-40) was entered on December 30, 1968, and a timely petition for rehearing was denied on January 29, 1969 (Appendix C, *infra*, p. 41). By order dated April 23, 1969, and signed by the Honorable Byron R. White, Associate Justice of this Court, the time for filing a petition for certiorari in this cause was extended to and including May 29, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The union and a number of construction contractors have an agreement providing that the contractors will not handle factory-assembled boilers. Until the early 1930's, boilers were assembled at construction job sites in the St. Paul-Minneapolis area by the contractors' employees, union members; after the early 1930's, factory-assembled boilers were brought into the area in increasing numbers; by 1963, between 75 and 85% of the boilers sold in the area were factory-assembled, and the contractors' employees were performing assembly work only on the remainder. The purpose of the agreement between the union and the contractors is to enable the union members to retain the little work they presently perform and to reacquire the boiler assembly work they previously performed.

The principal question presented is whether in these circumstances the Court of Appeals erred in holding that the agreement between the union and the contractors was a lawful work preservation agreement which did not violate the prohibition of the National Labor Relations Act against "hot cargo" clauses (Section 8(e)), and which could be enforced against the contractors through coercive measures without violating the prohibition of the Act against "secondary boycotts" (Section 8(b)(4)(B)).[1]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.*, are set forth in Appendix G, *infra*, pp. 86-87.

STATEMENT OF THE CASE

This case arose out of the efforts of Local Union 455 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("Local 455") to halt the use of "packaged boilers" in and around St. Paul, Minnesota. Packaged, or more precisely, shop-assembled, boilers, which many ABMA members manufacture, are complete steam generating units; all their various controls and items of external piping are factory attached to form completely finished products on which no further fabrication work need be done.

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[1] In addition, the following subsidiary question is presented:

> Whether the court below properly concluded that the National Labor Relations Board's "right of control" doctrine—the doctrine that employees cannot lawfully strike against their employer in furtherance of demands the employer is powerless to satisfy—is not a decisive principle in the construction of Section 8(b)(4)(B) of the National Labor Relations Act.

Should ABMA's position be accepted with respect to the principal question, the Court may also deem it appropriate to review the directly related subsidiary question. In order to preserve ABMA's position with respect to the latter issue, it is specifically adverted to herein. The Board's "right of control" doctrine is commented upon, *infra*, pp. 14-15, n. 7.

In order to promote the purchase and use of "field-assembled" boilers—boilers assembled in large part at a construction job site—Local 455 succeeded in incorporating a so-called "work fabrication" clause in its labor contract with St. Paul Association of Plumbing, Heating, and Mechanical Contractors, Inc. ("the Association"), an association of employer-contractors engaged in the installation of plumbing, heating, and related mechanical equipment. The fabrication clause provided, in effect, that the employer-contractors would not purchase or install packaged boilers. When certain contractors—including two who were following architect specifications, and another who was installing boilers purchased by a building owner—did not comply with the fabrication clause, Local 455 applied coercive pressures to enforce the clause.

Local 455's efforts to enforce its fabrication clause and to stop the installation of packaged boilers prompted ABMA to file unfair labor practice charges with the National Labor Relations Board. Acting on the charges, the Board's General Counsel, in January 1964, issued unfair labor practice complaints alleging, *inter alia*, that Local 455, the Association, the Association's member-contractors, and a non-member of the Association, Upper Midwest Piping, Incorporated ("Upper Midwest"), had engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) of the National Labor Relations Act—the Act's so-called secondary boycott and hot cargo provisions.

On August 5, 1965, the Board issued a Decision and Order (Appendix D, *infra*, pp. 42-61), in which it did not rule on the legality of Local 455's fabrication clause, but nevertheless dismissed substantially all the complaints' allegations.[2]

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[2] The Board did find that Local 455 had violated Section 8(b)(4)(B) of the Act as a result of a single instance of coercive conduct (Appendix D, *infra*, pp. 50-51). The Court of Appeals affirmed this finding (Appendix E, *infra*, pp. 73-74).

On October 6, 1966, the Court of Appeals, holding that the Board had erred in failing to rule on Local 455's fabrication clause, set aside and vacated the Board's decision to the extent that it determined that violations of the Act had not occurred, and remanded the case to the Board for further consideration (Appendix E, *infra*, pp. 62-74). Thereupon, acting on the remand order, the Board, on September 27, 1967, issued a Supplemental Decision and Order (Appendix F, *infra*, pp. 75-85), in which it upheld the validity of the fabrication clause, and affirmed its original dismissal of the complaint with respect to the issues remanded for reexamination.

Thereafter, the Court of Appeals reviewed the Board's Supplemental Decision and Order and entered the opinion (Appendix A, *infra*, pp. 23-38) which is the subject of this certiorari petition.

I. The Material Facts.

The material facts are as follows:

A. *The Manufacture, History, and Advantages of Packaged Boilers; Their Use in the St. Paul-Minneapolis Area.*

A "packaged" boiler is a complete, prefabricated, steam generating unit. It consists of five elements: a heat exchanger, a source of heat, a source of combustion air, operating controls, and safety controls. Thus to a pressure vessel are attached various controls and items of piping, the latter known as trim, oil, or gas, piping. A packaged boiler requires no further fabrication work; it is ready for use and need only be installed at the place where it will be operated (R. 267-268, 274-276, 278-279, 281-283, 414, 419, 420).[3] (A boiler, the component parts

[3] "R." refers to the printed Joint Record in the Court of Appeals.

of which are shipped separately and assembled at the job site, is characterized as "field-assembled" (R. 269-270)).

Packaged boilers are made in factories which utilize assembly line production methods and employ trained specialists. These boilers, before shipment, are thoroughly shop-tested and inspected for unit operation and performance. They are, as entities, warranted against defects, removal of any part voiding the warranty on unit operation; and they also bear an Underwriters Laboratory Seal which indicates conformance with specified standards (R. 274-277, 295-296, 312-317, 323-324, 425-428).

ABMA members have been manufacturing packaged boilers since 1932.[4] The number of such boilers manufactured annually has been increasing. During 1963, ABMA members produced over 5,600 boilers, having a total value of over $70 million. In 1963, about 50 percent of the boilers with internal firetubes that were sold by the entire boiler manufacturing industry were packaged. Also in 1963, 61 percent of all boilers with internal watertubes, and 70 percent of such boilers with capacities up to 100,000 pounds of steam per hour, which were produced and sold by ABMA members, were packaged boilers (R. 268-271, 286-287, 293-294, 374-375).

Packaged boilers first appeared in the St. Paul-Minneapolis area in the early 1930s. After the mid-1950s, their use increased markedly: by 1958, the number of packaged boilers coming into this area was "substantial"; by May 1963, between 75 and 85 percent of the boilers sold

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[4] Employees in 55 of the 60 manufacturing plants operated by ABMA members are represented by labor organizations. These organizations include affiliates of the Boilermakers Union, the Steelworkers Union, the Machinists Union, and two Electrical Workers Unions. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, the organization with which the Unions are affiliated, represents none of these employees (R. 285).

in the area were packaged (R. 167-168, 215-216, 243, 352-353).

The increased acceptance of packaged boilers over field-assembled boilers is attributable to a number of factors: their unit design, which assures better quality and greater efficiency; their lower price; and the fact of single-manufacturer responsibility for defects and malfunctioning (R. 186-187, 197-198, 210-212, 218-220, 268-269).

B. *The Fabrication Clause and Non-purchase List in the Local 455-Association Agreement.*

In July 1963, the Association[5] and Local 455 signed a three-year labor contract which, among its provisions, contained a so-called fabrication clause, Article II, Section 1(c), in part as follows (R. 380):

> As a primary working condition, it is agreed that all pipe formations, systems, or controls, or component parts thereof, included within the nonpurchase list attached hereto and made a part hereof as Exhibit I, as amended from time to time as provided in this agreement, shall be fabricated on the job site or in the shop of an Employer within the bargaining unit who is bound by this agreement, except as otherwise mutually agreed upon with relation to any particular job. . . .

The nonpurchase list, referred to in the fabrication clause, provided (R. 388):

> 1. Piping that is not attached at the factory, is not lined or pickled, or is not available as a standard

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[5] The Association has a membership of some 44 contracting firms which are engaged, from their respective places of business in St. Paul, Minnesota, in the installation of plumbing, heating, and related mechanical equipment. It exists for the purpose, in part, of representing its members in collective bargaining with Local 455 and in handling grievance matters and other labor disputes (R. 76-78, 95-96, 107-108).

fitting, or can be bent or formed with portable equipment.

2. On boilers, all piping beyond the gas and oil burners proper and trim piping on those boilers 30 horsepower or more. . . .

The fabrication clause also provided for the establishment of an industry fabrication committee with a membership of six, divided equally between Local 455 and the Association. The fabrication committee was empowered, *inter alia*, to make rules for the enforcement of its decisions, and to review, interpret, and amend the non-purchase list (R. 380-381).

C. *The Application and Enforcement of the 1963 Labor Contract.*

1. *The Minnesota Mining & Manufacturing Company Incident.* On July 3, 1963, Minnesota Mining & Manufacturing Company ("3-M"), ordered three prefabricated, packaged, boilers from Orr & Sembower, Inc. ("O & S"), for installation in the Benz Building. On July 11, 3-M contracted with D. W. Hickey Co., Inc., a St. Paul mechanical contractor and an Association member, for Hickey to install the boilers. To do the work, Hickey was to use its employees, who are members of Local 455 (R. 115, 159-162, 181-183, 254-255, 261-262, 429-452).

On August 16, Mooney, Local 455's assistant business agent, telephoned Rothstein, 3-M's director of industrial relations, and said that the packaged boilers 3-M had ordered infringed the fabrication clause of Local 455's 1963 contract with the Association. Mooney told Rothstein that Local 455 "had a claim on the piping of boilers"; that as a condition to the installation of the boilers "the piping would have to be cut and bent and shaped and threaded on the job site"; and that "it's entirely possible that if the men were given directions or orders to install the boilers they may refuse." The same day, Mooney mailed two copies of the Association-Local 455

contract to Rothstein (R. 134-137, 140-141, 182-183, 396).

On August 27, Mooney, who was one of Local 455's representatives on the industry fabrication committee, reported to the committee the 3-M packaged boiler order and Hickey's undertaking to do the installation work. The committee agreed that Hickey should be "advised" to inform 3-M that work on the Benz Building project would cease unless the packaged boiler matter was "resolved" (R. 112-113, 115-116, 393-394).

At a September meeting, Mooney told 3-M representatives that Local 455's members "just would not install" 3-M's packaged boilers because it would be a violation of the Local 455-Association contract (R. 118-120, 138-138a, 183-189, 206-207). Rothstein "received the definite impression by things that were said that if the boilers even arrived with piping on the men would probably walk off the job and would not even do other work" (R. 190-192).

Mooney also had three or four conversations with Swoboda, president of Hickey, in which he told Swoboda that the 3-M boilers could not be installed with piping formations attached. Mooney left the "impression" with Swoboda that the men would leave the job if the boilers arrived prepiped and if they were then unloaded (R. 143-146, 162-166).

Because of Mooney's strike threats, 3-M signed a memorandum agreement with Local 455, thereby agreeing that it would request O & S to remove nine items of trim piping from the boilers it had ordered, and that the items so removed would be assembled and attached at the Benz Building site. 3-M in fact caused the factory to remove these items and they were shipped separately. When the boilers arrived in St. Paul, they were inspected by Mooney, and the nine trim items were reattached by members of Local 455. The boilers were then installed in

the Benz Building (R. 142, 147, 165, 193-196, 256-257, 398-399, 401-402, 408-413).

Because of Local 455's efforts to forestall the installation of the packaged boilers, the completion of the Benz Building remodeling job was delayed for approximately ten weeks. This delay caused 3-M to spend $6,000 in order to keep the building in service during the winter months without the boilers it had ordered. The additional cost to 3-M for the removal, crating, shipping, and reattaching of the nine trim items was $3,164 (R. 168-169, 199-200, 203-204, 298-306, 311-312, 423-424).

3-M is not a member of the Association; nor does it have a separate labor contract with Local 455 (R. 116, 135, 205).

2. *The Pierre Aircon Incident.* In July 1963 Pierre Aircon Company ("Aircon"), a St. Paul mechanical contractor and Association member, signed a subcontract with a general contractor to install a boiler in the Deluxe Check Printers building located in the St. Paul area. The job specifications required that the boiler be a packaged Powermaster, over 30 h.p., and manufactured by O & S (R. 171-173).

Some time after Aircon signed the subcontract, Mooney sought out Howard Pierre, Aircon's president, and told him that Aircon would breach the 1963 Local 455-Association contract if it installed a "pre-piped" boiler in the Deluxe building. Mooney also brought the Deluxe boiler matter to the attention of the industry fabrication committee. As a result, about the time that the O & S boiler arrived in St. Paul, Pierre was summoned to a committee meeting by Moriarty. The committee members told Pierre that his acceptance of the O & S boiler "in the manner that it arrived" was a violation of their labor contract, and that "any packaged boiler should not come in with the accessories or burners prepiped" (R. 174-176).

After the meeting, the committee notified Pierre that Aircon was "assessed a penalty in the amount of $100" for violating the contract. Aircon paid the $100 "assessment," and was allowed to install the O & S packaged boiler "without any parts being disassembled" (R. 151-153, 175-176, 415, 417-418).

3. *The Upper Midwest Piping Incident.* In August 1963, Upper Midwest Piping, Incorporated ("Upper Midwest"), a mechanical contractor headquartered in Minneapolis, successfully bid a contract to perform mechanical work and to install boilers at the Rosemount School in St. Paul. Before bidding, Upper Midwest reviewed the plans and job specifications of the architects and engineers. The plans and specifications called for the installation of two packaged, automatic, boilers. In September, Upper Midwest ordered two packaged boilers, "per plans and specifications as prepared by [the architects and engineers]," from the Cleaver-Brooks Company, placing the order through the latter's local representative, the Heinen Co. Upper Midwest began work on the School job in October (R. 154, 222, 225-227, 238-240, 332-333, 405).

Around October 1, Sorenson, Upper Midwest's vice president, called Mooney and requested men for the School job. Mooney, referring to Upper Midwest's contract with Local 455, told Sorenson that under the contract's provisions trim piping and the gas train "shouldn't" be on the boilers when they were delivered to the job site (R. 154, 229-230). As a result of his conversation with Mooney, Sorenson told Heinen not to deliver the ordered boilers with the trim piping attached, and by letter, notified Heinen to "ship boilers with water column, relief valves and gas train unpiped, as per St. Paul's Local requirements" (R. 227-231, 237, 241-242, 406).

Heinen transmitted Sorenson's October 8 letter to Cleaver-Brooks. Because of Cleaver-Brooks' policy to refuse to sell nonpackaged boilers, the boilers were de-

livered to the School with all items of trim and piping attached. Sorenson accepted the boilers and they were installed by Upper Midwest's employees (R. 232, 242, 332-333, 338).

Upper Midwest is not a member of the Association. Its contract with Local 455, which was signed in August 1963, has terms and conditions, including a fabrication clause, identical to those in the 1963 Local 455-Association contract (R. 108, 222-225).

II. The Board's Original Decision; the First Opinion of the Court of Appeals.

In its original Decision, the Board, without passing on the legality of Local 455's fabrication clause, held that neither Section 8(e) nor Section 8(b)(4)(A) of the Act had been violated, and that Local 455 had violated Section 8(b)(4)(B) only by its conduct directed at Hickey and 3-M (Appendix D, *infra*, pp. 42-61).

The Court of Appeals, considering the matter for the first time, affirmed the Board's determination that Local 455 had violated Section 8(b)(4)(B) with respect to Hickey and 3-M, but vacated and set aside the Board's decision to the extent that it held that Sections 8(e) and 8(b)(4)(A) had not been violated and that Local 455 had not violated Section 8(b)(4)(B) by its conduct with respect to Aircon. The Court remanded the case to the Board with directions to determine the legality of the fabrication clause in Local 455's labor agreements, and to reexamine the remanded Section 8(e) and Section 8(b)(4)(A) issues in the light of its determination with respect to the fabrication clause (Appendix E, *infra*, pp. 62-74).

III. The Board's Supplemental Decision.

Relying on *National Woodwork Manufacturers Association, et al.* v. *National Labor Relations Board*, 386 U.S. 612 (1967), and stating that Local 455's purpose in

obtaining its fabrication clause was to preserve and reacquire traditional work for employees of the contracting employers, the Board held that Local 455's fabrication clause was a primary work preservation clause outside the prohibition of Section 8(e) of the Act (Appendix F, *infra*, pp. 78-80). The Board further held that so-called *ad hoc* agreements between Local 455 on the one side and the Association, Hickey, and Aircon on the other, and which applied and effectuated the fabrication clause, were not violative of Section 8(e) of the Act. In this connection, the Board concluded that to the extent that the *ad hoc* agreements had the same object as the fabrication clause, they were primary work preservation agreements also validated by *National Woodwork* and its companion case, *Houston Insulation Contractors Association* v. *National Labor Relations Board*, 386 U.S. 664 (1967); and to the extent that such agreements involved secondary employers—the Association and Hickey, because they lacked the power to control the assignment of work—they were protected by the construction industry proviso to Section 8(e) (Appendix F, *infra*, pp. 80-81, 82-83, 84-85).

The Board further concluded that Local 455 had not engaged in other unlawful conduct prohibited by Sections 8(b)(4)(A) and (B) of the Act (Appendix F, *infra*, pp. 81, 83, 85).

IV. The Second Opinion of the Court of Appeals.

The Court of Appeals rejected ABMA's contention that *National Woodwork* and *Houston Insulation* were not controlling because Local 455's objective was for the most part to reacquire work its members had ceased to perform. It expressly relied on this Court's opinion in *National Woodwork* to affirm the Board's conclusions that Local 455's fabrication clause was a lawful "work preservation" clause which could be enforced by employees through concerted activity directed at their employers (Appendix A, *infra*, pp. 23-33).

The Court of Appeals also held that Aircon was a "primary" employer, and consequently that Local 455's conduct with respect to Aircon, even if coercive, did not violate Section 8(b)(4)(B) of the Act (Appendix A, infra, pp. 34-36).[6] The Court rested its holding that Aircon was not a secondary employer on its view expressed in the companion case hereto, *American Boiler Manufacturers Association* v. *N.L.R.B.*, 404 F.2d 556 (8th Cir., 1968), that the Board's "right of control" doctrine was not a correct rule of law.[7]

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[6] The Court rejected the Board's finding that a new *ad hoc* agreement resulted from Local 455's efforts to enforce its fabrication clause against Aircon; consequently, the Court did not treat Section 8(b)(4)(A) of the Act as a relevant statutory provision (Appendix A, *infra*, p. 35).

[7] ABMA is not petitioning for certiorari with respect to the companion case hereto. There, the Court of Appeals said: ". . . we emphasize . . . that the 'right of control' is a factor to be considered in deciding whether concerted activity by unit employees has an illegal objective. We hold only that the 'right of control' in and of itself is not of decisive significance." *American Boiler Manufacturers Association* v. *N.L.R.B.*, 404 F.2d at 561-562 (8th Cir., 1968).

Under the Board's "right of control" doctrine a union engages in unlawful secondary activity, and therefore violates Section 8(b)(4)(B) of the Act, when it "demands that a contractor do something he is powerless to do except by ceasing to do business with somebody not involved in the dispute." See *Ohio Valley Carpenters District Council* v. *N.L.R.B.*, 339 F.2d 142, 145 (6th Cir., 1964). Stated otherwise, the Board doctrine treats as decisive the inability on the part of a boycotted employer to make a work assignment the union is demanding.

The majority opinion in *National Woodwork* expressly pointed out that the Court was not passing upon the validity of the Board's "right of control" doctrine. *National Woodwork Manufacturers Association, et al.* v. *National Labor Relations Board*, 386 U.S. 612, 616-617, n. 3. The doctrine has been approved by the Second, Sixth, Seventh, and District of Columbia Circuits. See *N.L.R.B.* v. *Enterprise Association*, 285 F.2d 642, 645-646 (2nd Cir., 1960); *Ohio Valley Carpenters District Council* v. *N.L.R.B.*, 339 F.2d 142, 145 (6th Cir., 1964); *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 354 F.2d 594 (7th Cir., 1965); *Local 5, United Association of Journeymen* v. *N.L.R.B.*, 321 F.2d 366, 369, 372 (D.C. Cir., 1963), *cert. denied*, 375 U.S. 921; *Local 636, United Associa-*

The Court further held that the memorandum agreement between 3-M and Local 455 was violative of Section 8(e) and that Local 455's strike threats to coerce the agreement were violative of Section 8(b)(4)(A) (Appendix A, *infra*, pp. 36-38).

REASONS FOR GRANTING THE WRIT

1. The issue raised by this certiorari petition—whether, under the doctrine of "work preservation," a union may reach out to acquire work it is not performing—is extremely important in the interpretation and administration of the National Labor Relations Act. It is also an issue which this Court expressly left open in its landmark opinion in *National Woodwork Manufacturers Association, et al.* v. *National Labor Relations Board*, 386 U.S. 612 (1967). Consequently, the court below mistakenly relied on *National Woodwork* to support its conclusion that Local 455's fabrication clause was a lawful "work preservation" agreement.

In *National Woodwork*, the issues were whether a union-contractor agreement providing that ". . . no member of the [union] will handle . . . any doors . . . which have been fitted prior to being furnished on the job . . .," was lawful under Section 8(e) of the Act; and whether the union's actual boycott of prefitted doors, pursuant to the union-contractor agreement, was lawful under Section 8(b)(4)(B). The Court majority concluded that there was no violation in either instance because the objective of the "will not handle" agreement "was pres-

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tion of Journeymen v. *N.L.R.B.*, 278 F.2d 858, 864 (D.C. Cir., 1960). The Eighth Circuit's present view, although inconsistent with its own earlier decision involving ABMA, where the Board's "right of control" doctrine was expressly approved (see *American Boiler Manufacturers Association* v. *N.L.R.B.*, 366 F.2d 815, 822 (Appendix E, *infra*, pp. 73-74), accords with the view expressed by the Third Circuit in *N.L.R.B.* v. *Local Union No. 164, I.B.E.W.*, 388 F.2d 105 (3rd Cir., 1968).

ervation of work traditionally performed by job-site carpenters," and the conduct of the union "related solely to preservation of the traditional tasks of the jobsite carpenters" (386 U.S. at 645-646). As explained by Justice Brennan for the Court majority (386 U.S. at 644-645): "The determination whether the 'will not handle' sentence of [the contract provision] and its enforcement violated § 8(e) and § 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contractor's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, [the contractor], the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary."

Although *National Woodwork* thus established the proposition that primary work preservation agreements are not within the secondary boycott prohibitions of the Act, it is also quite clear, both from the facts of the case and the Court's opinion itself, that the reach of *National Woodwork* is limited; that, as the Court used the term, "work preservation" has a narrow connotation; and that the immunity the case grants does not extend to every agreement which is justified by a "work preservation" claim. Factually, *National Woodwork*, unlike this case, did not involve the efforts of a union to reach out to reacquire work its members had long since ceased to perform. Thus, nothing was said either in the majority or the dissenting opinions in *National Woodwork* to indicate that the local carpenter employees were not *currently* performing the work they were claiming, or that their performance of such work had been other than *continuous*. Indeed, the contrary was accepted by this Court as the fact: "Customarily, before the doors could be hung on such projects, 'blank' or 'blind' doors would be mortised for the knob, routed for the hinges, and beveled to make them fit between jambs. These are tasks tradi-

tionally performed in the Philadelphia area by the carpenters employed on the jobsite" (386 U.S. at 615-616); "The finding of the Trial Examiner, adopted by the Board, was that the objective of the ['will not handle'] sentence was preservation of work traditionally performed by the job-site carpenters. This finding is supported by substantial evidence . . ." (386 U.S. at 645-646); "Union members traditionally had performed the task of fitting doors on the jobsite . . ." (Justice Harlan's Memorandum, 386 U.S. at 648).[8]

That the union in *National Woodwork* was seeking only to protect its "customary" and "normal" work not only provided a telling answer to an argument pressed upon the Court, but it also resulted in a carefully circumscribed majority position.[9] Thus in *National Woodwork*, the Court majority said (386 U.S. at 630-631):

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[8] The Transcript of Testimony before the Board in *National Woodwork* shows that the job-site carpenters had been doing the work the charged union was claiming for 80 years, and that the installation of pre-cut millwork, including doors, had not knowingly been permitted by the union. See the Transcript of Record in the Supreme Court in *National Woodwork*, pp. 108, 109-110.

[9] The "work preservation" claim in *Houston Insulation Contractors Association* v. *National Labor Relations Board*, 386 U.S. 664, the companion case to *National Woodwork*, was also based on work "customarily" performed: "Customarily, Johns-Manville had ordered rolls of wire which were then cut to size by members of Local 22" (386 U.S. at 666); "The cutting and mitering of asbestos fittings for such jobs was customarily performed at Armstrong's Houston shop . . ." (386 U.S. at 667); "For several years Armstrong had purchased straight lengths of premoulded asbestos insulation from Thorpe Products Company, . . . Originally mitering had been done on the job with hand tools. At the time involved, however, and apparently for several years before, mitering had been done in Armstrong's shop in Houston . . ." (*Houston Insulation Contractors Association* v. *N.L.R.B.*, 357 F.2d 182, 185 (7th Cir.)); "Generally, Armstrong only purchases straight lengths of asbestos from Thorpe, and Armstrong's employees then miter or cut the asbestos at angles with a saw and glue these cut sections together . . . JM had always purchased coils or rolls of steel from Techalloy which JM's employees would cut into bands or strips to be used in applying insulation materials" (148 NLRB 866, 867-868).

> . . . even on the premise that Congress meant to prohibit boycotts such as that in *Allen Bradley* [*Allen Bradley Co.* v. *Local 3, Electrical Workers*, 325 U.S. 797 (1945)] without regard to whether they were carried on to affect labor conditions elsewhere, the fact is that the boycott in *Allen Bradley* was carried on not as a shield to preserve the jobs of Local 3 members, traditionally a primary labor activity, but as a sword, to reach out and monopolize all the manufacturing job tasks for Local 3 members. It is arguable that Congress may have viewed the use of the boycott as a sword as different from labor's traditional concerns with wages, hours, and working conditions. But the boycott in the present case was not used as a sword; it was a shield carried solely to preserve the members' jobs. *We therefore have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product.* [Emphasis added.]

And Justice Harlan, who joined in the Court's opinion but wrote a separate Memorandum "by way of underscoring the salient factors" underlying the decision, also said (386 U.S. at 648):

> The facts as found by the Board and the Court of Appeals show that the contractual restrictive-product rule in question, and the boycott in support of its enforcement, had as their sole objective the protection of union members from a diminution of work . . . . *This, then, is not a case of a union seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs.* [Emphasis added.]

In sum, the work reacquisition issue involved in this case is one which lies in an area about which *National Woodwork* did not speak. And, therefore, the reliance upon *National Woodwork* by the Court of Appeals to decide that issue was entirely misplaced, and, very pos-

sibly, led the court below to a conclusion that was entirely erroneous.

2. Contrary to the holding of the Court of Appeals, the same acceptance should not be accorded a contractual provision like that here involved, which is aimed at gaining for local employees work they are claiming but not performing, and a provision like that in *National Woodwork*, which was aimed at protecting work that the local carpenters were not only claiming but were actually performing. For different results necessarily flow from the different factual situations. In the one case, where the aim is the protection of customary work, the contractual clause tends to stabilize the work distribution by preserving the *status quo;* in the other, where the union is reaching out for new work, the *status quo* is disrupted and attendant problems of unemployment and readjustment are created for employees, employers, and communities that lose their traditional and customary work. Or, to state the matter somewhat differently, if the validity of the clause is upheld before work is actually lost or abandoned, employees, employers, and communities are merely deprived of the *possibility* of *future* work and business; but if the clause is upheld after the employees have stopped performing it, the latter groups are *actually* deprived of their *present* work and business.

In the narrow circumstances of *National Woodwork*, it is clear therefore that that case sanctioned a provision that had little, if any, disruptive consequences for the door manufacturers involved, the manufacturers' employees, or the communities in which the latter worked. Here, by contrast, in view of the facts and under the rulings of the Court of Appeals, the disruptive effects upon the boiler manufacturers, their employees, and the communities where the boiler manufacturing plants are located, are far reaching.[10]

[10] Approached, moreover, from the viewpoint of its disruptive consequences, it is clear that no meaningful distinction can be

3. At variance with its position in this case, the Board itself originally endorsed the view that a contract clause could not escape the proscription of Section 8(e) because it had as its objective work-acquisition or work-reacquisition. *Local 282, Teamsters (Precon Trucking Corporation)*, 139 NLRB 1077 (1962); *Meat & Highway Drivers, Etc., Local No. 710 (Wilson & Co., Inc.)*, 143 NLRB 1221. In the *Precon* case, moreover, the Board specifically took cognizance of the "disruptive consequences" principle and rested its decision thereon. In *Precon*, the facts showed that Precon had for a long time sold materials to Consolidated Edison, and these materials ordinarily had been picked up by Consolidated using its own trucks and drivers. Precon drivers, however, had delivered merchandise sold to one of Consolidated's subsidiaries. When the subsidiary merged with the parent, Consolidated Edison drivers began picking up the goods formerly delivered by Precon's personnel. In renewal negotiations with Precon, the union sought a contract clause requiring Precon to use its drivers, when available, for all deliveries. Thus the Precon union was seeking not only to recapture the recently lost work, but to perform work it had not previously performed. The Board adopted the trial examiner's rationale, and held that Section 8(b)(4) barred a strike over the demand. Because in the broad view the case involved the allocation of work between Consolidated Edison drivers and Precon drivers, the Board regarded as relevant in the disposition of the matter "equitable and practical considerations as between the two classes

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drawn between a contractual provision which has as its objective the *acquiring* of work and one, like that involved here, which has as its objective the *reacquiring* of work. For whether its purpose be work-acquisition or work-reacquisition, each such provision stands, to use the *National Woodwork* metaphor, as a "sword" for work aggrandizement—*i.e.*, for reaching out to gain job tasks not being performed by unit employees; and each, therefore, has the identical potential for causing the same damaging results, economic as well as communal, to befall both the employees whose jobs are coveted as well as their employers. See Comment, 62 Mich. L. Rev. 1176, 1189.

of drivers," as well as the economic importance to Consolidated Edison of using its own trucks for the purpose involved. The union in this view was not primarily seeking—

> to hold on to what it has but to prevent Con Edison and its drivers from continuing to work as they have historically . . . . [T]he work sought by Precon drivers is not traditionally theirs but is as much, if not more, traditionally and equitably the work of others. (139 NLRB at 1088.)

Finally, the Board, in *Precon*, emphasized the "equitable and practical difference" between "striving to maintain conditions in a bargaining unit . . . and in seeking to *disrupt* an existing arrangement." [Emphasis added.] 139 NLRB at 1088.

In the *Wilson* case, the union sought, on a work-preservation basis, to justify a contractual provision which the Board held was secondary and violative of Section 8(e). The Board noted that "relations" involving other employers "had been firmly established," and accordingly the Board was unwilling to permit the employees to recapture their lost work "by infringement upon the rights of other employees in other units of the same or different employers." 143 NLRB at 1227-1230.[11]

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[11] Reviewing the Board's decision in the *Wilson* case, the District of Columbia Circuit applied a different standard, *i.e.*, whether the jobs sought after are "fairly claimable" for the bargaining unit, and held that the union had engaged in protected primary activity. *Meat and Highway Drivers, etc., Local No. 710* v. *N.L.R.B.*, 335 F.2d 709, 713 (1964). The "fairly claimable" standard was subsequently applied by the Board in *Highway Truck Drivers and Helpers, Local 107 (S.E. McCormick, Inc.)*, 159 NLRB 84, 98, *vacated and remanded sub nom. A. Duie Pyle, Inc.* v. *N.L.R.B.*, 383 F.2d 772 (3rd Cir. 1967), to validate a union's claim to *acquire* work the unit employees had *never* performed, but which was "comparable in character" to the work performed by unit employees. That the union's claim in the *McCormick* case would "necessitate changes in previously long established business relationships," was considered by the Board to be of no consequence.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 1969.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,033

AMERICAN BOILER MANUFACTURERS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL UNION 455 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA,
Intervenor.

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[December 6, 1968]

Before MEHAFFY, GIBSON and HEANEY, Circuit Judges.

HEANEY, Circuit Judge.

This is the second time that this matter has been before this Court. On the first occasion, we enforced the Board's order in part. We then remanded the matter to the Board to determine the legality of a "fabrication" clause in a collective bargaining agreement between the

United Association Pipe Fitters Local Union No. 455, and the St. Paul Association of Plumbing, Heating and Mechanical Contractors, Inc., and to take other action consistent with the views expressed in the opinion. *American Boiler Manufacturers Association* v. *N.L.R.B.*, 366 F.2d 815 (8th Cir. 1966).

The facts are reported in detail in the two decisions of the Board [1] and the earlier decision of this Court, and will be repeated here only to the extent necessary to an understanding of the opinion.

Packaged boilers with trim piping attached were introduced and used in the St. Paul area before 1941. By the mid-1940's, ten per cent of the boilers being installed were of the packaged variety. Their use increased rapidly and by 1963, had risen to sixty to eighty-five per cent of all boiler installations.

Prior to the use of packaged boilers, the boilers and the trim piping were shipped separately and assembled on the job site by members of the Union. The advent of packaged boilers resulted in a decrease of work at the job site for members. The work claimed took two men about two days for each installation.

In 1959 and 1961, the Union tried unsuccessfully to obtain a clause in their agreement with the Association requiring that trim piping be installed by unit employees. They obtained such a clause in 1963:

> "Article II.
>
> * * * *
>
> "(c) Fabrication.
>
> "As a primary working condition, it is agreed that all pipe formations, systems, or controls, or component parts thereof, included within the nonpurchase

[1] *American Boiler Mfrs. Assn.*, 167 N.L.R.B. No. 79, 66 L.R.R.M. 1098 (1967); *American Boiler Mfrs. Assn.*, 154 N.L.R.B. No. 12, 59 L.R.R.M. 1727 (1965).

list attached hereto and made a part hereof as Exhibit I, as amended from time to time as provided in this agreement, shall be fabricated on the job site or in the shop of an Employer [2] within the bargaining unit who is bound by this agreement, except as otherwise mutually agreed upon with relation to any particular job."

"Exhibit I.

"Non-Purchase List.

* * * *

"2. On boilers, all piping beyond the gas and oil burners proper and trim piping on those boilers 30 horsepower or more."

The fabrication clause did not cover construction contracts signed or bid on prior to the execution of the agreement.

The agreement provided for a fabrication committee, composed of an equal number of representatives of the Union and the Association, to apply, interpret and enforce the provisions of the fabrication clause.[3] It provided that deadlocks were to be broken through arbitration.

This proceeding arose out of the efforts of the Union to secure compliance with the fabrication clause on three

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[2] All of the disputes involved in the instant case were on the job site.

[3] "Upon the execution of this agreement a committee shall be appointed or elected, to be known as the Industry Fabrication Committee, consisting of six (6) members, three (3) to represent the Employer Association and three (3) to represent the Union. Each member shall serve upon said committee until his successor is chosen by the party selecting his predecessor. Two members present from each side shall be necessary for a quorum, and if in any meeting the representation is unequal, the side having a member absent shall have his vote to cast, so that in all meetings voting strength shall be equal to both sides. * * *"

jobs—3-M, Aircon and Upper Midwest Piping. A common question is presented as to each job: Is the fabrication clause a per se violation of § 8(e) of the National Labor Relations Act, 29 U.S.C.A. § 158, *et seq.*?[4] The Board answered in the negative. We agree.

We stated in our earlier decision that the Supreme Court could be expected to set forth guidelines which would aid in answering the above question. The guidelines were forthcoming in the companion cases of *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612 (1967), and *Houston Insulation Contractors Association* v. *National Labor Relations Board*, 386 U.S. 664 (1967).[5]

In *National Woodwork*, a Carpenters Union and a Contractors Association had agreed that Union members would not handle doors which had been fitted prior to being furnished on the job. Prefitted doors were delivered to the job of a signator contractor. When the Union threatened not to hang the doors, the contractor agreed to substitute blank doors to be fitted by the carpenters on

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[4] "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: * * *"

§ 8(e), National Labor Relations Act, 29 U.S.C.A. § 158, *et seq.*

[5] These decisions invoked a great deal of commentary in both trade journals and law reviews. See, Browne, *The Court, the N.L.R.B. and Free Collective Bargaining—A Second Look*, 54 A.B.A.J. 561 (1968); Johns, *Analysis of Philadelphia Pre-Cut Door Decision*, Labor Law Bulletin of the Associate General Contractors of America No. 9 at 1 (May 24, 1967); Petro, *Unions, Housing Costs, and the National Labor Policy*, 32 Law & Contemp. Prob. 319 (1967); *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 247 (1967); Note, *Secondary Boycotts and Work Preservation*, 77 Yale L. J. 1401 (1968); Note, 28 La. Rev. 279 (1968); Note, 46 Texas L. Rev. 283 (1967); 34 Brooklyn L. Rev. 332 (1968).

the job. The Union was charged with violating §§ 8(e) and 8(b) (4) (B) of the Act.[6]

The Board dismissed both allegations. The Supreme Court affirmed stating that a Union has a right to protect work "traditionally" done by its members at job sites by concerted activity directed towards a primary employer. The holding in *National Woodwork* was summarized in *Houston* as follows:

> "* * * [C]ollective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity. * * *"

Houston, 386 U.S. at 668.

Houston extended *National Woodwork* to a situation in which a local Union sought to preserve work opportu-

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[6] "(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is—

* * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

§ 8(b) (4) (B), National Labor Relations Act, 29 U.S.C.A. § 158, *et seq.*

nities of the members of another local but employed by the same employer. The Court said:

> "A boycott cannot become secondary because engaged in by primary employees not directly affected by the dispute, or because only engaged in by some of the primary employees, and not the entire group. Since that situation does not involve the employer in a dispute not his own, his employees' conduct in support of their fellow employees is not secondary and, therefore, not a violation of § 8(b) (4) (B)."

Houston, 386 U.S. at 669.

National Woodwork and *Houston* give support to the Board's decision in this case, but the petitioner argues that they are not controlling as the Union here is seeking to reacquire, as well as preserve, work. The petitioner urges that *National Woodwork* and *Houston* intended the term "traditional work" to encompass only that work which is currently, continuously and exclusively performed by unit employees. The petitioner relies on two statements in *National Woodwork* to support its position:

> "We * * * have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product."

National Woodwork, 386 U.S. at 630-31.

> "* * * This, then, is not a case of a union seeking to restrict by contract or boycott an employer with respect to the product he uses, for the purpose of acquiring for its members work that had not previously been theirs."

National Woodwork, 386 U.S. at 648 (concurring opinion of Mr. Justice Harlan).

We reject the petitioner's contention. The record in *National Woodwork* demonstrates that the objective of the Union was to reacquire, as well as preserve work.

There, as here, reacquisition of work was involved.[7] The trial examiner, whose findings were adopted by the Board, indicated that the use of blank doors may have been the exception rather than the rule:

> "* * * The record shows that there have been occasions when millwork, including doors, came to a jobsite without having been previously cut out and fitted, that the tasks of cutting out and fitting such millwork, including doors, were considered by the contracting parties to be unit work to be performed by the jobsite carpenters, and that the carpenters on the jobsite did in fact perform those tasks on those occasions. * * *"

Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Etc. [Board Decision in *National Woodwork*], 149 N.L.R.B. No. 65, 656-57.

Neither of the statements cited by the Association support the view that traditional work is limited to work which is currently, continuously and exclusively performed by the unit members. Both statements refer to the possibility of acquiring new jobs or job tasks—jobs that had never been performed.

We express no opinion as to whether a fabrication clause can be enforced if the objective is to acquire work which unit employees had never performed or work which they may have performed in the past but have completely lost before the clause was negotiated.[8] We hold only that

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[7] The trial examiner also found that one-third of the doors being shipped into the Philadelphia area by two large manufacturers, at the time the unfair labor practice charge was lodged, were precut or prefit doors. *Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Etc.*, 149 N.L.R.B. No. 65, 656-57.

[8] For a discussion of this problem, see, Johns, *Analysis of Philadelphia Pre-Cut Door Decision, supra* note 5; *The Supreme Court, 1966 Term, supra* note 5 at 251-52; Note, *Secondary Boycotts and Work Preservation, supra* note 5 at 1410-12; Note, 28 La. L. Rev. 279, 289-90 (1968); 34 Brooklyn L. Rev. 332, 336 (1968).

the term "traditional work" includes work which unit employees have performed and are still performing at the time they negotiated a work-preservation clause.

It follows from the teachings of *National Woodwork* that a union can protect this work by concerted activities where the objective is to affect the labor policies of the employer with whom they have a collective bargaining agreement.

The petitioner further argues that other sections of the Act, §§ 8(b)(4)(D), 10(k) and 8(b)(6), protect an employer against Union work aggrandizement. Thus, it would be incongruous to interpret § 8(e) so as to allow reacquisition of work, a form of aggrandizement.

This Court finds no such incongruity. These sections are not blanket prohibitions. They are aimed at resolving particular kinds of disputes arising out of a Union's attempt to acquire work. Sections 8(b)(4)(D) and 10(k) deal with jurisdictional disputes. Section 8(b)(6) deals with situations where a Union, under the guise of reacquiring work, extracts payments from an employer for services which are not performed or not to be performed.[9]

The petitioner contends that economic injury to its members and their employees will flow from permitting the Union to reacquire the work involved in affixing the trim piping on the job. The Supreme Court answered this argument in *National Woodwork* when it said:

> "* * * [H]owever severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective."

National Woodwork, 386 U.S. at 627.

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[9] For a discussion of the problem, see, Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA 8b4 and 8e*, 113 U. Pa. L. Rev. 1000, 1039 (1965).

The petitioner also argues that an affirmance of the Board's decision will discourage the use of cheaper and better products and will thus retard the growth and developments of new products and techniques.

While this argument may or may not have merit, the Supreme Court made it clear in *National Woodwork* that it would not lightly impute to Congress an intent in § 8(e) to preclude labor management agreements designed to ease the impact on employees that may be affected by advanced technology.[10]

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[10] They observed:

"In addition to all else, '(t)he silence of the sponsors of (the) amendments is pregnant with significance. . . .' *Labor Board* v. *Fruit & Vegetable Packers, supra,* 377 US at 66, 12 L ed 2d at 135. Before we may say that Congress meant to strike from workers' hands the economic weapons traditionally used against their employers' efforts to abolish their jobs, that meaning should plainly appear. '(I)n this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor.' *Fibreboard Paper Prods. Corp.* v. *Labor Board,* 379 US 203, 225, 13 L ed 2d 233, 247, 85 S Ct. 398, 6 ALR3d 1130 (concurring opinion of Stewart, J.). We would expect that legislation curtailing the ability of management and labor voluntarily to negotiate for solutions to these significant and difficult problems would be preceded by extensive congressional study and debate, and consideration of voluminous economic, scientific, and statistical data. The silence regarding such matters in the Eighty-sixth Congress is itself evidence that Congress, in enacting § 8(e), had no thought of prohibiting agreements directed to work preservation. In fact, since the enactment of § 8(e), both the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, and the Subcommittee on Unemployment and the Impact of Automation and the Select Subcommittee on Labor of the House Committee on Education and Labor have been extensively studying the threats to workers posed by increased technology and automation, and some legislation directed to the problem has been

The petitioner's final contention is that the fabrication clause was secondary and unlawful because it was intended to aid the Union's members generally, rather than unit employees. We find this argument to be without merit. The Board found that the Union's objective was "to preserve for employees in the unit work traditionally done by them * * * not for members of the Union generally * * *". This finding is amply supported by the record.

The fabrication clause gives as its objective the preservation of work for the bargaining unit:

> "(4) The Committee shall endeavor to meet at least quarterly for the purpose of review of the lists and possible alterations of the same, having in mind the purpose of preserving locally as much work as possible *within this bargaining unit*, while meeting the current needs of the Industry." [Emphasis added.]

The record is clear that the trim piping, if not done by the boiler manufacturer in its plant, is done on the construction job site by pipefitters. Since the Union had no objectives as to the employees of any boiler manufacturer, the coverage of the clause was limited to the pipefitters who were employees of the contractors. These contractors were either members of the multi-employer unit or employers with individual contracts with the Union.

The cases cited by the petitioner [11] are inapposite. They

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passed. We cannot lightly impute to Congress an intent in § 8 (e) to preclude labor-management agreements to ease these effects through collective bargaining on this most vital problem created by advanced technology."

National Woodwork Manufacturers Association v. *National Labor Relations Board*, 386 U.S. 612, 640-42 (1967).

[11] *N.L.R.B.* v. *New York Lithographers & Photo-Eng. U. No. One-P*, 385 F.2d 551 (3d Cir. 1967); *N.L.R.B.* v. *Local 217, United Ass'n of Journeymen & App.*, 361 F.2d 160, 162 (1st Cir. 1966); *N.L.R.B.* v. *Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (9th Cir. 1964); *N.L.R.B.* v. *Milk Wagon Drivers' Union, Local 753*, 335 F.2d 326 (7th Cir. 1964); *United Mine Workers*, 165 N.L.R.B. No. 49,

stand for the principle that where a union's objective is to benefit union members generally, as distinguished from employees in the particular bargaining unit, the objectives exceed the union's legitimate interests in that bargaining unit. Accordingly, efforts taken in support of the objectives constitute unlawful secondary action. Here, we have upheld the Board's finding that the Union was not reaching out to benefit union members generally wherever employed.

To summarize, we hold that a collective bargaining agreement which seeks to preserve work currently being performed by unit employees and to reacquire that portion lost is not violative of § 8(e). It follows from the teachings of *National Woodwork* that employees can enforce such an agreement through concerted activity which is directed at their employer.

In affirming the Board's decision, we reiterate the cautionary footnote in *National Woodwork:*

> "We likewise do not have before us in these cases and express no view upon, the antitrust limitations, if any, upon union-employer work-preservation or work-extension agreements. * * *"

National Woodwork, 386 U.S. at 631, n. 19.

The holding here and that in *National Woodwork* are dispositive of the issues raised in the Upper Midwest Piping incident. The decision of the Board with respect to that incident is, therefore, affirmed.

We turn to a discussion of issues raised in Aircon and 3-M that were not resolved by *National Woodwork* or *Houston* and that have not heretofore been discussed in this opinion.

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65 L.R.R.M. 1324 (1967); *Balto. Lithographers and Photoengravers Union, Local 2-P* 160 N.L.R.B. No. 90, 63 L.R.R.M. 1126 (1966); *Local Union No. 710, Etc.*, 143 N.L.R.B. No. 117, 53 L.R.R.M. 1475 (1963).

THE AIRCON DISPUTE

After signing the collective bargaining agreement with the Union, Aircon contracted to install a boiler in a St. Paul building. The specifications required the installation of a packaged boiler. The boiler was shipped to the job site and accepted by Aircon. The Union learned of this, called the matter to the attention of Aircon and requested a meeting of the fabrication committee. Aircon attended the meeting and was informed that its acceptance of the boiler was a violation of the fabrication clause. The committee voted unanimously to assess Aircon a penalty of $100 for the violation.[12] Aircon paid the $100 and installed the packaged boiler as delivered.

The Board found that the committee's action "constituted the entering into of a new ad hoc agreement * * *." It held that the ad hoc agreement was not violative of § 8(e):

> "* * * [T]o the extent that it involved work-preservation [the agreement fell] * * * outside the scope of Section 8(e); to the extent that [the agreement falls within the scope of that section] * * *, it would be protected by the construction industry proviso. The fact that the agreement involved payment of $100 by Aircon does not * * * deprive the * * * agreement of the proviso's protection."

American Boiler Mfrs. Assn., 154 N.L.R.B. No. 12, 59 L.R.R.M. 1727, 1731 (1965).

The Board also held that, as there was no evidence that the Union sought any agreement other than the one reached, the Union's conduct in securing the agreement was not violative of § 8(b)(4)(A).[13]

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[12] The payment was made to the Industry Fund, which had been established for the benefit of employees in the work unit.

[13] "(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

[Footnote continued on page 35]

We reject the Board's holding that the proceeding before the fabrication committee resulted in a new ad hoc agreement. No new agreement with a secondary objective was reached and no additional parties became bound to the original agreement. The proceeding before the fabrication committee was nothing more than the enforcement of the original fabrication clause in accordance with the collective bargaining agreement. If there was a § 8 violation, it was under § 8(b) (4) (B) and not under § 8(e) or § 8(b) (4) (A).

The question then is: Did the Union violate § 8(b) (4) (B) by bringing Aircon's violation to the attention of the fabrication committee and voting to assess a penalty against it? The Board answered this question in the negative. It reasoned that the Union had followed a peaceful method of resolving the dispute and that, therefore, its conduct did not constitute coercion within the meaning of § 8(b) (4) (B).

In seeking review of the Board's determination, the petitioner concedes that this issue is only presented if we hold that the Board's doctrine of "right of control" [14] is a

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[13] [Continued]

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) Forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;"

§ 8(b) (4) (A), National Labor Relations Act, 29 U.S.C.A. § 158, *et seq.*

[14] *Pipe Fitters Local No. 120, United Association of Journeymen and Apprentices of the United States and Canada, AFL-CIO*, 168

correct rule of law. In light of our contrary holding in the companion Minneapolis case, we need not decide this issue. The Union's conduct, even if coercive, was not violative of § 8(b) (4) (B) for the same reason that it was not violative as to Upper Midwest Piping. Its sole objective was the preservation of traditional work for its members.

We affirm the order of the Board for the reasons stated above.

THE 3-M DISPUTE

3-M contracted with Hickey, a member of the Contractors Association, to install packaged boilers. 3-M had ordered the boilers prior to contracting with Hickey.

The Union learned of Hickey's intent to install the packaged boilers and threatened to strike if the packaged boilers were delivered to the job. The threats were made to both Hickey and 3-M.

After some discussion, 3-M agreed to revise its order. It instructed the manufacturer to ship unpackaged boilers. When they arrived at the job site, the Union and 3-M signed a memorandum agreement stating that the Union had advised 3-M that it would not install the packaged boilers. The memorandum also stated that 3-M had revised its specifications to provide that certain fabrication work would be performed on the job site.

This Court held that the Union's conduct as to 3-M was a violation of § 8(b) (4) (B) because 3-M was neither the employer of the employees involved in the dispute nor a party to the collective bargaining agreement. It was not

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N.L.R.B. No. 138, 67 L.R.R.M. 1034 (1968); *Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Etc.*, 149 N.L.R.B. No. 65, 57 L.R.R.M. 1341 (1964); *Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Cardinal Industries, Inc)*, 144 N.L.R.B. No. 16, 54 L.R.R.M. 1003 (1963).

a primary employer. *American Boiler Manufacturers Association* v. *N.L.R.B.*, *supra* at 822. We also held that the Union's conduct as to Hickey was violative of §8 (b) (4) (B) because Hickey did not have the "right of control."

We did not decide, however, whether the Union had also violated § 8(e) and § 8(b) (4) (A) by entering into the memorandum agreement with 3-M. We remanded the matter to the Board for that determination.

Notwithstanding our remand, the Board declined to rule on this issue. It gave as its reason the fact that no specific allegation as to the validity of the agreement between the Union and 3-M had been made in the original complaint. The Board erred in failing to do so. It has an obligation to decide material issues which have been fairly tried by the parties even though they have not been specifically pleaded. *American Boiler Manufacturers Association* v. *N.L.R.B.*, *supra* at 821.

We will not remand to the Board for a second time. We hold that the memorandum agreement between the Union and 3-M was violative of § 8(e). 3-M was not a party to the original agreement and did not employ members of the bargaining unit. The agreement was not, therefore, directed at the labor policies of the primary employer. The Union's sole objective was to require 3-M to refrain from requiring Hickey to use packaged boilers on the job.

Nor does the proviso to § 8(e) validate the agreement. The proviso to § 8(e) reads:

> "* * * *Provided* that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building structure, or other work: * * *."

29 U.S.C.A. § 158.

Since 3-M was not an employer in the construction industry, the proviso does not apply.

We, therefore, hold that the threats of strike by the Union to coerce this agreement were violative of § 8(b)(4)(A).

We remand to the Board for action consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19033

AMERICAN BOILER MANUFACTURERS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL UNION 455 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA,
Intervenor.

JUDGMENT

Before: MEHAFFY, GIBSON and HEANEY, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the American Boiler Manufacturers Association to review the supplemental order of the National Labor Relations Board issued pursuant to remand by this Court on September 27, 1967, reaffirming its original order of August 5, 1965, dismissing the complaint in Board Case Nos. 18-CE-4, 18-CE-6, and 18-CC-143. The Court heard argument of respective counsel on April 8, 1968, and has considered the briefs and transcript of record filed in this cause. On December 6, 1968, the Court being fully advised in the premises handed down its opinion deny-

ing in part and granting in part the said petition to review the Board's supplemental order. In conformity therewith it is

ORDERED AND ADJUDGED by the United States Court of Appeals for the Eighth Circuit that so much of the petition to review the said supplemental order of the National Labor Relations Board dated September 27, 1967, as relates to the "3-M Dispute" is hereby granted, and that in all other respects the said petition to review is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that so much of the Board's supplemental order as pertains to the "3-M Dispute" is hereby set aside and that portion of the cause herein is remanded to the Board for action consistent with this Court's opinion.

Dated: Dec 30 1968

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19033

AMERICAN BOILER MANUFACTURERS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR REVIEW OF SUPPLEMENTAL DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

Petition of petitioner for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

January 29, 1969

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 18-CE-4

UNITED ASSOCIATION PIPE FITTERS LOCAL UNION NO. 455 and UNITED ASSOCIATION PLUMBERS & GASFITTERS LOCAL UNION NO. 34, both affiliated with the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,[1] and ST. PAUL ASSOCIATION OF PLUMBING, HEATING AND MECHANICAL CONTRACTORS, INC.,[2] *et al.*

and

Case No. 18-CE-6

UNITED ASSOCIATION PIPE FITTERS LOCAL UNION NO. 455 and UNITED ASSOCIATION PLUMBERS & GASFITTERS LOCAL UNION NO. 34, both affiliated with the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, and UPPER MIDWEST PIPING, INCORPORATED

and

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[1] Herein referred to respectively as Local Union No. 455 and Local Union No. 34, and jointly as the Respondent Unions.

[2] Herein referred to as the Contractors Association.

Case No. 18-CC-143

UNITED ASSOCIATION PIPE FITTERS LOCAL UNION No. 455, affiliated with the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO (D. W. HICKEY CO., INC., and MINNESOTA MINING & MANUFACTURING COMPANY)

and

AMERICAN BOILER MANUFACTURERS ASSOCIATION [3]

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

On July 14, 1964, Trial Examiner Reeves R. Hilton issued his Decision in the above-entitled proceeding, finding that the Respondents, Local Union No. 455 and the Contractors Association, its member-contractors, and Upper Midwest Piping, Incorporated, had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's decision. He also found that the Respondent Unions had not engaged in certain other alleged unfair labor practices, and recommended that the complaint be dismissed with respect thereto. Thereafter, the General Counsel, the Respondent Unions, and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs.

The National Labor Relations Board has reviewed the rulings of the Trial Examiner made at the hearing and

[3] Herein referred to as the Charging Party.

finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in these cases, including the Trial Examiner's Decision, the exceptions, and the briefs,[4] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

1. We find, in agreement with the Trial Examiner, that Local Union No. 455 did not threaten, coerce, or restrain Bettenberg, Townsend, Stolte & Comb Company, in violation of Section 8(b)(4)(ii)(A) or (B) of the Act.[5] We also agree with the Trial Examiner that Local Union No. 34 has not engaged in any conduct violative of the National Labor Relations Act, as amended, and we shall dismiss the complaint with respect to it.

2. The Trial Examiner found (a) that Local Union No. 455 and the Contractors Association and its contractor-members, in the course of conduct occurring in connection with the 3-M and the Pierre Aircon construction projects, and Local Union No. 455 and Upper Midwest Piping, Incorporated, in the course of conduct occurring in connec-

[4] The Charging Party's request for oral argument before the Board is hereby denied as the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

[5] We do not, however, adopt the Trial Examiner's further finding that the evidence fails to show that Bettenberg Company is engaged in commerce. The Trial Examiner found, and the record shows, that Bettenberg Company, alleged to be a secondary person herein, is engaged in performing services as consulting engineers and architects in the building and construction industry; and that the other alleged primary and secondary employers affected by the conduct involved herein are employers or persons engaged in commerce or operations affecting commerce. In these circumstances, we find that Bettenberg Company is a person engaged in an industry affecting commerce within the meaning of Sections 8(b)(4) of the Act. *Madison Building & Construction Trades Council, et al. (H & K Lathing Co., et al.)*, 134 NLRB 517; *Sheet Metal Workers International Association, Local Union No. 299, AFL-CIO, et al. (S. M. Kisner and Sons)*, 131 NLRB 1196.

tion with the Upper Midwest construction project, interpreted, construed and applied Article II, Section 1(c), of the 1963 collective-bargaining agreement, referred to as the "fabrication clause," in a manner violative of Section 8(e) and (b), that Local Union No. 455 also violated Section 8(b)(4)(ii)(A) and (B) in the course of this conduct. For the reasons set forth below, we agree that Local Union No. 455 violated Section 8(b)(4)(ii)(B) by its conduct in connection with the 3-M project, but we do not find the conduct of the Respondents violative of the Act in any other respect.

3. *The 1963 collective-bargaining agreement.* So-called "packaged" boilers, or boilers with trim piping attached at the factory, were being installed in the St. Paul area in steadily increasing numbers, resulting in a considerable decrease in the trim piping installation work to be done at the jobsite which had previously been available to members of Local Union No. 455. The Union therefore sought, and finally obtained in its 1963 collective-bargaining agreement with the Contracting Association Upper Midwest Piping, Incorporated, and other mechanical contractors in the area, a fabrication clause which provided, in substance, that, "As a primary working condition," trim piping "shall be fabricated on the jobsite or in the shop of an Employer within the bargaining unit who is bound by this agreement." The agreement also established a fabrication committee made up of representatives of the parties to determine disputes.

4. *The 3-M Incident.* About July 3, 1963, the Minnesota Mining & Manufacturing Company, herein referred to as 3-M, ordered from Orr & Sembower, Inc., through its area agent, Blesi-Evans Company, 3 packaged boilers to be delivered in 10 weeks, and, on July 11, 3-M signed an agreement with D. W. Hickey Co., Inc., to install the boilers in the Benz Building which 3-M was remodeling. Hickey Company, a member of the Contractors Association, was a party to the 1963 agreement. On three sepa-

rate occasions, Mooney, a business representative of Local Union No. 455, informed Hickey Company that the packaged boilers which had been ordered were in violation of the contract and, if they arrived "prepiped," his men would not install them. On August 16, Mooney warned 3-M's industrial relations director, Rothstein, that 3-M "was going to have a problem over the installation of these new boilers" because of the contractual fabrication clause, and, if the men were ordered to install the boilers, "they may refuse" to do so.

On August 27, the fabrication committee established by the 1963 agreement, on which both the Contractors Association and Local Union No. 455 were represented, held a meeting at the request of the Local Union. After Mooney related his efforts "to head off a dispute" at the Benz Building, the committee "agreed" that Hickey Company's contract with 3-M to install the boilers was in violation of the 1963 agreement, and that Hickey Company should inform 3-M "that work on the Benz Building would have to cease unless the problem of shipping package boilers with trim piping attached was resolved." Thereafter, Moriarty, executive vice president of the Contractors Association and recording secretary of the fabrication committee, so informed Hickey Company by letter and sent a copy to 3-M.

Representatives of Local Union No. 455 met with 3-M officials on September 2. Moriarty, who was also at the meeting, expressed the opinion that the 1963 agreement prohibited installation of packaged boilers. At that meeting, and at subsequent meetings on September 6 and 12, the Union representatives present reaffirmed their position "that if the boilers come in with piping formations attached, that we would not install them." Thereafter 3-M notified Orr & Sembower to withhold shipment of the boilers, which, although ready to be shipped by September 13, were withheld in accordance with this notice. About October 5, 3-M agreed to have the disputed piping

removed from the boilers, and Mooney agreed that his members would then install them. Pursuant to instructions from 3-M, Orr & Sembower removed the piping items specified and, on October 11, shipped them in a separate container along with the boilers. When the boilers arrived at the jobsite, Rothstein and Mooney, after inspecting them to make certain the objectionable parts had been removed, signed a memorandum stating that Mooney had advised 3-M that members of Local Union No. 455 would not install the packaged boilers at the Benz Building in St. Paul, and that 3-M had revised its specifications to provide that certain fabrication work on the boilers would be performed at the jobsite. On the same day, Hickey Company's employees, members of Local Union No. 455, began reassembling the parts and installing the boilers.

(a) *The alleged violation of Section 8(e).* No issue is here presented concerning the legality of the execution of the fabrication clause.[6] The issue raised by the complaint is whether the Contractors Association, its contractor-members (including Hickey Company),[7] and Local Union No. 455, by their conduct in connection with the 3-M project, entered into a new agreement construing, interpreting, and applying the fabrication clause in a manner violative of Section 8(e).

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[6] We find no merit in the contention of the Charging Party that the Board should find the fabrication clause *per se* violative of Section 8(e). As the Trial Examiner found, and as acknowledged in the brief of the Charging Party, the General Counsel did not allege in the complaint, not urge at the hearing, that execution of this clause, in itself, constituted a violation of Section 8(e) even though there was no Section 10(b) bar to such an allegation. See *United Association Pipe Fitters Local Union No. 539 et al. (American Boiler Manufacturers Association)*, 154 NLRB No. 11, issued simultaneously herewith, in which the Board found no merit in a similar contention raised by the same Charging Party.

[7] We note that 3-M was not a member of the Contractors Association, was not named in the complaint as a respondent, and no agreement between it and Local Union No. 455 is alleged as a violation of Section 8(e).

As noted above, the 1963 agreement established the fabrication committee to handle disputes. This committee met on August 27 and reached agreement that Hickey Company's contract with 3-M, in which it agreed to install the packaged boilers in the Benz Building, was a violation of the fabrication clause, and that work on this building would have to cease unless the packaged boilers issue was resolved. It is clear from these facts that the committee members entered into a new *ad hoc* agreement on August 27. It is likewise clear that both the Contractors Association and Local Union No. 455, whose representatives were present and participated in the August 27 meeting, were parties to this agreement, and that Hickey Company was also a party by virtue of its delegation of bargaining authority to the Association.

Finally, it is clear and we find that this new agreement, which interpreted the fabrication clause as prohibiting the installation of packaged boilers, was designed to preserve, obtain, or reacquire for employees in the Contractors Association unit who were members of Local Union No. 455, the work of attaching the trim piping which employees in this unit had historically performed. Therefore, to the extent that its purpose was work-preservation, this agreement would fall outside the scope of Section 8(e).[8] This agreement, moreover, pertained solely to trim piping work to be done on the boilers to be installed at this project. As these boilers had been ordered by 3-M Company, neither the Contractors Association, nor any of its members, including Hickey Company which had contracted merely to install the boilers,

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[8] Cf. *Service and Maintenance Employees Union Local No. 399, AFL-CIO (United Artists Theatre Circuit, Inc.)*, 148 NLRB No. 99; *Milk Wagon Drivers and Dairy Employees Union Local 603, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Drive-Thru Dairy, Inc.)*, 145 NLRB 445, 449. Member Fanning concurs in this finding for the reasons expressed in *United Association Pipe Fitters Local Union No. 539 et al. (American Boiler Manufacturers Association)*, *supra*, footnote 2.

was in a position to assign the trim piping work to Hickey's employees as sought by the Union. Even if the Respondent Employers are therefore to be regarded as secondary employers and the August 27 agreement as a "hot goods" agreement within the scope of Section 8(e),[9] the agreement was, nevertheless, protected by the construction industry proviso to that section because it related to construction site work. Thus, the August 27 agreement prohibited entirely the installation of packaged boilers at this construction site.[10] The agreement clearly did not constitute an attempt to prescribe conditions under which or by whom trim piping could be installed at the factory. Moreover, although the fabrication clause might be read as contemplating that trim piping work could be performed in the shop of an employer, the legality of that clause is not here in issue. It is clear that the August 27 agreement by its terms indicates no intent that the trim piping work here involved should be done at any location other than at the jobsite, and there is no evidence that the contracting parties intended any other location.[11] Accordingly, we find, contrary to the Trial Examiner, the General Counsel has failed to establish that a violation of Section 8(e) occurred at this project.

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[9] Compare *Ohio Valley Carpenters District Council (Cardinal Industries, Inc.)* (Member Brown dissenting), 144 NLRB 91, 93, enfd. November 19, 1964 (C.A. 6); *Local 5, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, etc. (Arthur Venneri Company)* (Member Fanning dissenting on other grounds), 137 NLRB 828, enfd. 321 F.2d 366 (C.A. D.C.).

[10] See *Ohio Valley Carpenters District Council, etc. (Cardinal Industries, Inc.)*, 136 NLRB 977, 988.

[11] *Ohio Valley Carpenters District Council, etc. (Cardinal Industries, Inc.)*, 136 NLRB 977, 989, relied on by the Trial Examiner, is inapposite. The agreement in that case which the Board found not protected by the proviso, unlike the August 27 agreement in the instant case, permitted the use of prefabricated materials on the project site but only if they were made within the union's jurisdictional area by outside carpenters who were members of the union and/or employed under the union's contract conditions.

(b) *The alleged violation of Section 8(b)(4)(ii)(A).* As we have found that the August 27 agreement was not prohibited by Section 8(e), as the memorandum agreement between 3-M and Local Union No. 455 signed by Rothstein and Mooney on October 16 is not alleged to be violative of Section 8(e), and as there is no evidence that Local Union No. 455 was seeking any agreements other than the ones it obtained, we find that the Union did not violate Section 8(b)(4)(ii)(A).

(c) *The violation of Section 8(b)(4)(ii)(B).* This section, in substance, prohibits a union from threatening, coercing, or restraining any person with an object of forcing or requiring any person to cease handling the products of any producer or to cease doing business with any person. Moreover, this section, unlike Section 8(e), contains no exemption for the construction industry.[12]

As shown above, Local Union No. 455 made repeated threats, both to Hickey Company and to 3-M, to take economic action by refusing to install the boilers in packaged form. As noted above, Hickey Company had contracted only to install the boilers; consequently, it was a secondary employer in this dispute because it was, as the Union admits, powerless to effect the results sought by the Union—assignment of the trim piping work to the Union's members. The Union's objectives, therefore, in uttering these threats to Hickey Company, must have been, and we find that they were, to force that Company to cease doing business with 3-M and to cease handling boilers produced by Orr & Sembower, and, consequently, to force 3-M to cease doing business with Orr & Sembower. We find that Local Union No. 455, by threatening Hickey Company with a strike with such objectives, violated Section 8(b)(4)(ii)(B) of the Act.

Although 3-M had control over the work sought by the Union's members in that it was 3-M which ordered

[12] See *Northeastern Indiana Building and Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB No. 93, p. 3 ff.

the boilers, 3-M was not the employer of the employee-members of the Union involved in the dispute, nor was it a party to the 1963 collective-bargaining agreement. It is clear, therefore, that Mooney's statements to 3-M that the members of Local Union No. 445 would not install the packaged boilers were not threats to strike 3-M, but threats to strike Hickey Company, with the object of forcing 3-M to cease handling the packaged boilers produced by Orr & Sembower. We find that Local Union No. 455, by thus threatening 3-M with a secondary strike against Hickey Company, with such an object, further violated Section 8(b) (4) (ii) (B).[13]

5. *The Pierre Aircon incident.* Pierre Aircon Company, a member of the Contractors Association and a signatory to the 1963 agreement, received a contract on July 3, 1963, to install a boiler at the Deluxe Check Building project. The contract specified a packaged boiler manufactured by Orr & Sembower, but the record does not show who ordered the boiler. After the boiler was de-

[13] As our dissenting colleague recognizes, his views on this issue herein have previously been rejected by the Board which, with Court approval, has long recognized that the right of control is a significant factor bearing on the question whether union conduct is primary or secondary. See *Metropolitan District Council, etc. (National Woodwork Manufacturers Association)*, 149 NLRB No. 65, pp. 13-15 (Member Brown dissenting in part); *Ohio Valley Carpenters District Council (Cardinal Industries, Inc.)*, 144 NLRB 91, 93 (Member Brown dissenting), enfd. 339 F.2d 142 (C.A. 6); *International Longshoremen's Association, AFL-CIO, et al. (Board of Harbor Commissioners)*, 137 NLRB 1178 (Member Fanning concurring, Member Brown dissenting); *Local 5, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, etc. (Arthur Venneri Company), supra.* Cf. *United Association Pipe Fitters Local Union No. 539 et al. (American Boiler Manufacturers Association), supra* (Tonks Toys incident); and *Metropolitan District Council, etc. (National Woodwork Manufacturers Association), supra*, p. 6 and footnote 21, in which the Board found no violations of Section 8(b) (4). In the latter two cases, unlike the situation here, the respondent unions' strike threats were aimed directly at employers who not only had control over assignment of the disputed work, but also were the employers of the employee-members of the unions who sought the work.

livered, Mooney requested Howard Pierre, president of Pierre Aircon Company, to attend, as a guest, a meeting of the fabrication committee, which he did on October 22, 1963. The committee, whose members in attendance included Mooney of Local Union No. 455 and Moriarty of the Contractors Association, informed Pierre that his acceptance of the packaged boiler would violate the 1963 agreement. The record does not reveal Pierre's response. The committee minutes show that, after Pierre left the meeting, the committee unanimously adopted a motion that Pierre Aircon Company pay $100 for violating the fabrication clause of the collective-bargaining agreement by "entering into a contract . . . with the Deluxe Check Company for the installation of a . . . boiler [which] arrived with the trim on." Thereafter, Pierre Aircon Company paid the $100 and installed the packaged boiler.

(a) *The alleged violation of Section 8(e).* It is evident that the Fabrication Committee's action of October 22 constituted the entering into of a new *ad hoc* agreement which provided, in effect, that the installation of the packaged boiler at this site would be permitted upon the payment of $100 by Pierre Aircon Company. Local Union No. 455 and the Contractors Association, whose representatives entered into the agreement, and Pierre Aircon Company, as an association member, were parties to this agreement.

Unlike the Trial Examiner, however, we find nothing in this agreement of October 22 violative of Section 8(e). Like the August 27 agreement at the 3-M project, discussed above, this agreement, to the extent that it involved work preservation, would fall outside the scope of Section 8(e); to the extent that it falls within the scope of that Section, it would be protected by the construction industry proviso. The fact that the agreement involved payment of $100 by Aircon does not in our opinion deprive the October 22 agreement of the proviso's protection.

(b) *The alleged violation of Section 8(b)(4)(ii)(A).* As we have found that the October 22 agreement was lawful, and as there is no evidence that the Union sought any agreement other than the one reached, we find that the Union's conduct in securing it was not violative of Section 8(b)(4)(ii)(A).

(c) *The alleged violation of Section 8(b)(4)(ii)(B).* The facts show that, unlike the 3-M incident discussed above, Local Union No. 455 did not threaten to strike this project. There is, in our view, a significant distinction between the use of strikes or threats thereof as an economic weapon in the settlement of disputes between labor and management, and the resort to peaceful means of resolving such disputes such as their submission to the Board or to the courts for determination.[14] The agreement upon responsible compensation for what the Union contended was a breach of its contract was similarly a peaceful method of resolving its dispute without a strike or threat thereof. Accordingly, we find that Local Union No. 455, by its conduct herein, did not threaten, coerce, or restrain the Employers herein within the meaning of subsection (ii) of Section 8(b)(4), and therefore did not violate Section 8(b)(4)(ii)(B).

6. *The Upper Midwest Piping incident.* Upper Midwest Piping, Incorporated, was a member of the Mechanical Contractors Association of Minneapolis, Inc., which had a collective-bargaining agreement with Local Union No. 539, a sister local of Local Union No. 455, which agreement contained a fabrication clause similar to the one contained in the Local Union No. 455 agreement. Although both the Minneapolis and St. Paul agreements contained reciprocal clauses covering employer members

[14] See *Northeastern Indiana Building and Construction Trades Council (Centlivre Village Apartments), supra; Orange Belt District Council et al.* v. *N.L.R.B. (Calhoun Drywall Company),* 328 F.2d 534 (C.A. D.C.).

working in either area,[15] when Upper Midwest Piping obtained a contract, on about August 5, 1963, to install two packaged boilers in the Rosemont School in St. Paul, it became a signatory to the Local Union No. 455 agreement. On September 9, Upper Midwest Piping ordered two boilers of the type specified in its contract from Cleaver-Brooks Company, through Heinen Company, the latter's agent in St. Paul. Early in October, business representative Mooney told Sorensen, vice president of Upper Midwest Piping, over the telephone, that, under the fabrication clause, "the trim piping and the gas train, etc., shouldn't be on these boilers when they came in," and that it was "our work". Mooney, in his testimony at the hearing regarding this conversation, stated: "Mr. Sorensen isn't the kind of man that you have to come up with a threat. . . . Merely a matter of explaining to him what the labor agreement was all about." Shortly after this telephone conversation with Mooney, Sorensen orally instructed Heinen not to deliver the boilers at the jobsite with the trim piping attached, and followed up with a letter containing the same instructions "as per St. Paul's local requirements". Although Heinen passed Sorensen's instructions along to Cleaver-Brooks Company, the boilers were delivered in packaged form and were being installed at the time of the hearing by Upper Midwest Piping employees who were members of Local Union No. 539 of Minneapolis.

(a) *The alleged Section 8(e) violation.* We find it unnecessary to, and therefore do not, determine whether Local Union No. 455 and Upper Midwest Piping, by their conduct in the course of this incident, entered into an implied agreement interpreting the fabrication clause. Such agreement would, in any event, not be violative

[15] These clauses provide that an employer-member of one association performing work in the jurisdiction of another local union is bound by all the provisions of the agreement effective in that jurisdiction "to the same extent as if signatory thereto."

of Section 8(e) as it would, for the reasons set forth above in regard to the agreement between Hickey Company and the Union at the 3-M project, be protected by the construction industry proviso.[16]

(b) *The alleged Section 8(b)(4)(ii)(A) violation.* As the purported agreement, if any, would not have been unlawful, we find that the Union's conduct in pursuit of such an agreement would not have been violative of Section 8(b)(4)(ii)(A).

(c) *The alleged violation of Section 8(b)(4)(ii)(B).* The facts show that Mooney informed the president of Upper Midwest Piping that the trim piping "shouldn't" be on the boilers when they were delivered. This statement clearly did not constitute a threat. Moreover, we do not agree with the Trial Examiner that "Local 455's pattern of conduct" provides a basis for finding an implied threat in Mooney's statements or conduct in the course of this incident. Therefore, in the absence of any evidence that the Union threatened, coerced, or restrained Upper Midwest Piping or any other person within the meaning of subsection (ii) of Section 8(b)(4), and as the boilers were installed in packaged form as ordered, we find that Local Union No. 455 did not violate Section 8(b)(4)(ii)(B) at this project.[17]

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations

[16] We note that Upper Midwest Piping was not a member of the Respondent Contractors Association, that the Fabrication Committee took no action regarding this project, that Mechanical Contractors Association of Minneapolis, Inc., is not a respondent in this proceeding, and that no violations of the Act by either Association are alleged in connection with this incident.

[17] *Local 38, International Brotherhood of Electrical Workers, AFL-CIO (Wells Electrical Construction Company)*, 148 NLRB No. 79, pp. 4-5; *General Teamsters Local No. 162 etc. (B. P. John Furniture Corporation)*, 144 NLRB 536, 545.

Board hereby orders that the Respondent, United Association Pipe Fitters Local Union No. 455, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Threatening, coercing, or restraining D. W. Hickey Co., Inc., or any other person engaged in commerce, where an object thereof is to force or require said Company or any other person to cease using, selling, handling, or dealing in the products of, or to cease doing business with Orr & Sembower, Inc., Minnesota Mining & Manufacturing Company, or any other person.

(b) Threatening, coercing, or restraining Minnesota Mining & Manufacturing Company or any other person engaged in commerce, where an object thereof is to force or require said Company or any other person to cease using, selling, handling, or dealing in the products of, or to cease doing business with Orr & Sembower, Inc., or any other person.

2. Take the following affirmative action which the Board finds necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in its offices, meeting halls, and places where notices to its members are customarily posted, copies of the attached notice marked "Appendix." [18] Copies of said notice, to be furnished by the Regional Director for Region 18, shall, after being duly signed by an authorized representative of Respondent Local Union No. 455, be posted immediately upon re-

[18] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

ceipt thereof, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the said Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for Region 18 signed copies of the aforementioned notice for posting by each of the employers who are willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, shall, after being signed by the said Respondent, as indicated, be forthwith returned to the Regional Director for disposition by him.

(c) Notify said Regional Director in writing, within 10 days from the date of this Order, what steps the said Respondent has taken to comply herewith.

It Is Further Ordered that the complaint in Case No. 18-CE-4 and Case No. 18-CE-6 be dismissed in its entirety, and the complaint in Case No. 18-CC-143 be dismissed insofar as it alleges unfair labor practices other than as found by the Board.

Dated, Washington, D. C.

FRANK W. McCULLOCH, Chairman,

JOHN H. FANNING Member,

HOWARD JENKINS, JR. Member,
NATIONAL LABOR RELATIONS BOARD.

(Seal)

Member BROWN, dissenting in part:

I disagree with my colleagues' conclusion that Respondent Local 455 violated 8(b)(4)(ii)(B) by threatening to strike D. W. Hickey Co., Inc., if it breached the appli-

cable collective-bargaining agreement by installing packaged boilers on the 3-M project. Instead, I find this conduct legitimate economic pressure designed to protect unit work as contemplated by Local 455's collective-bargaining agreement with the Mechanical Contractors Association, to which Hickey was a party.

The provision invoked against Hickey, referred to herein as the "fabrication clause," provided, in substance, that the external piping on boilers is to be fabricated by unit employees of signatory-employers. It was incorporated in the 1963 agreement for the purpose of reducing the inroad on unit work occasioned by increased use of so-called packaged boilers, which involve factory assembly of external piping by nonunit employees.[19] During the period here in controversy, and with reference to the 3-M project, the Fabrication Committee, composed of representatives of the Respondent Employers and Labor Organizations and contractually empowered to resolve disputes arising under the "fabrication clause," construed this provision as precluding a signatory employer from installing packaged boilers on any project covered by the agreement.

Consistent with the view of my colleagues, the "fabrication clause," as interpreted by the Committee, represented a genuine attempt to protect "fairly claimable jobs" of unit employees.[20] Thus, in regulating the economic relationship between signatory employers and their employees, the clause has been applied in a manner which

[19] The record shows that before 1938 most boilers installed in the St. Paul area had their external piping attached at the jobsite by employees represented by Respondent Unions and employed by pipe fitting contractors many of whom belonged to the Mechanical Contractors Association. In the period between 1958 and 1963, the use of packaged boilers, with external piping applied at the manufacturer's plant, increased from 10 percent to 60-75 percent of all boilers installed.

[20] *Teamsters, Local 710 (Wilson & Co., Inc., et al.)* v. *N.L.R.B.*, 335 F.2d 709, 713-714 (C.A. D.C.).

(1) merely defines work that must be performed by unit employees, (2) does not impose a legally cognizable obligation upon any nonsignatory employer, (3) does not reflect an intent to regulate labor policies of third persons doing business with signatories, (4) does not regulate the terms and conditions of employment of employees outside the bargaining unit, and (5) may not be utilized by the contracting Unions to support their dispute with nonsignatories. It is apparent that—as intended, interpreted, and administered—the "fabrication" clause represents a genuine effort to preserve the work of employees in the contract unit represented by Respondent Unions. The clause is thus primary in scope, and any business cessations resulting from its direct implementation against signatory employers would merely amount to an "incidental secondary effect" outside the interdict of Section 8(e).[21]

Without disputing the foregoing, the majority concludes that Local 455's strike action against Hickey, though merely designed to enforce the Fabrication Committee's interpretation of the clause, was violative of Section 8(b)(4)(B). The majority then goes on to state that, as applied to Hickey, the Committee's interpretation was secondary and would violate Section 8(e) if not exempted by the construction industry proviso thereto. In both respects, the majority finds a proscribed secondary objective solely because Hickey had no authority to assign the fabrication work to his employees. Violation, therefore, rests upon the majority's willingness to regard the ele-

[21] *Metropolitan District Council of Philadelphia, etc. (National Woodwork Manufacturers Association)*, 149 NLRB No. 65; *Service and Maintenance Employees' Union (United Artists Theatre Circuit, Inc.)*, 148 NLRB No. 99. Compare *Local 282, International Brotherhood of Teamsters, etc. (U.S. Trucking Corp.)*, 146 NLRB 956, 962; enfd. 344 F.2d 649 (C.A. 2), decided April 22, 1965, where in finding a violation of Section 8(b)(4)(i)(ii)(B) the Board and the Court specifically distinguished a situation where a union is "enforcing the contractual rights" or "preserving work" in the bargaining unit represented by the union.

ment of "control" as the conclusive determinant of objective, an approach I have repeatedly rejected.[22]

In my opinion, the Hickey incident pointedly illustrates the unrealistic consequences attendant in determining validity of objective under a standard which is both alien to the statutory scheme and broad enough to condemn conduct falling outside the ambit of 8(b)(4)(B) and 8(e). For, there can be no question that the "power of control" test when applied to the instant circumstances conditions the primary or secondary nature of Local 455's conduct upon the form of a signatory employer's breach of contract. Thus while my colleagues concede that no statutory violation would exist had Hickey possessed the authority and itself ordered the packaged boilers,[23] they find a violation of 8(b)(4)(B) solely because Hickey's contract breach took the form of accepting a business undertaking which frustrated the contractually guaranteed job rights of his employees. I see no relevant distinction. In either case, the deprivation of unit work, being equally offensive to unit employees under their contract, would be likely to precipitate, as it in fact did, a contract-oriented labor dispute against Hickey. Unless 8(b)(4)(B) is to be viewed as regulating contractual disputes between an employer and his employees in regard to the terms and conditions of those employees, I see no justification for the majority's preoccupation with formal aspects of an employer's breach of a lawful work preservation provision in determining whether a labor organization may lawfully apply direct economic pressure

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[22] See, e.g., my dissenting opinions in *Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Cardinal Industries, Inc.)*, 144 NLRB 91, 94; and *National Woodwork Manufacturers Association, supra.*

[23] See the companion case of *United Association Pipe Fitters Local Union No. 539, et al. (American Boiler Manufacturers Association)*, 154 NLRB No. 11, issued simultaneously herewith, where the majority dismisses the 8(b)(4)(B) allegation with respect to the "Tonka Toys incident" because the signatory employer breached the fabrication clause by ordering a packaged boiler.

against that employer on behalf of offended employees. For the above reasons, and under all the circumstances, it is my opinion that Local 455's conduct, designed as it was to enforce compliance with contractually guaranteed job rights of unit employees, constituted traditional primary action not proscribed by Section 8(b)(4)(B). Accordingly, and as I agree with the majority's dismissal of all other allegations, I would dismiss the consolidated complaints in their entirety.

Dated Washington, D. C.

GERALD A. BROWN, Member
NATIONAL LABOR RELATIONS BOARD.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18,106

AMERICAN BOILER MANUFACTURERS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED ASSOCIATION PIPE FITTERS LOCAL UNION 455, *et al.*,
Intervenors.

No. 18,200

UNITED ASSOCIATION PIPE FITTERS LOCAL UNION 455, *et al.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

[October 6, 1966]

ON PETITIONS TO REVIEW, AND ON CROSS-PETITION TO ENFORCE, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before VAN OOSTERHOUT and BLACKMUN, Circuit Judges, and HARPER, District Judge.

VAN OOSTERHOUT, Circuit Judge.

Case No. 18,106 is before us upon petition of American Boiler Manufacturers Association (ABMA) pursuant to

§ 10(f) of the National Labor Relations Act as amended, 29 U.S.C.A. § 151, et seq., to review the decision and order of the National Labor Relations Board filed August 5, 1965, and published at 154 NLRB No. 12. The unfair labor practices charged occurred in St. Paul, Minnesota, within this circuit. Hence, this court has jurisdiction.

In Case No. 18200, United Association Pipe Fitters Local Union 455, etc., Union 455 seeks a review of the portion of the Board's order adverse to it. The Board by cross-petition seeks enforcement of such portion of its order.[1]

Upon charges filed by ABMA, the General Counsel filed a complaint with the Board alleging that Local 455[2] and the St. Paul Association of Plumbing, Heating and Mechanical Contractors, Inc., hereinafter called Association, had engaged in unfair labor practices affecting commerce in violation of § 8(b)(4)(ii)(A) and (B)[3] of the Act and § 8(e) of the Act.

Important questions relating to the interpretation of § 8(b)(4)(ii)(A) and (B) and § 8(e) are here presented. Amicus Curiae briefs in support of ABMA's position have been filed by National Association of Manufacturers and by Air-Conditioning and Refrigeration Institute, Mechanical Contractors Association of America, Inc., and Associated General Contractors of America. The Board's decision is supported by briefs filed by its

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[1] Local 455's petition for review was originally filed in the District of Columbia Circuit and has been transferred here by order of such court.

[2] The complaint was also against United Association Pipe Fitters Local Union 34. The Board found no violation by Local 34. ABMA in brief states it is not pressing here the validity of that part of the decision. Consequently, we give no consideration to the charges against Local 34.

[3] By the Landrum-Griffin 1959 amendment. Subdivision (A) of the Act as it had previously existed was amended and designated as Subdivision (B).

General Counsel, by respondent Local 455, and by Amicus Curiae brief of Building and Construction Trades Department, AFL-CIO.

Our case No. 18,107 involved similar cases arising in Minneapolis and we have granted petitions of parties in that case for leave to intervene in this case.

The legal issues here presented arise out of efforts of Local 455 to prohibit the installation of packaged boilers in the St. Paul territory. A packaged boiler is a complete steam generating unit. It comprises of a heat exchanger, a source of heat, a source of combustion air, operating controls, and safety controls. The packaged boiler is manufactured in factories by assembly line methods. All fuel piping, trim piping and controls are attached at the factory and the completed unit is tested and warranted against defects, which warranty may be voided if any parts are removed. It bears an underwriter's laboratory seal which means it conforms to specified standards. It is shipped for installation at the job site, ready for installation without further fabrication.

Packaged boilers were first introduced and used in the St. Paul area some twenty-five years ago. By the mid-1950s, some 10% of the boilers installed were packaged boilers. Since then their use has increased rapidly and there is substantial evidence that by 1963 60% to 85% of all boiler installations in the St. Paul area were packaged boilers.

Local 455 is a union representing approximately 500 craftsmen in the St. Paul area claiming jurisdiction over the installation of all plumbing and pipe fitting systems in the area, including trim piping and exterior boiler equipment.

Association is composed of 44 plumbing, heating and mechanical contractors in the St. Paul area. It negotiates collective bargaining agreements with Local 455.

Most non-member contractors also usually sign any agreement arrived at.

Prior to the use of packaged boilers, trim pipe and other component parts here in controversy were shipped separately and assembled by Local 455 members. The advent of packaged boilers thus resulted in a decrease of work at the job site for Local 455 members. There is evidence that the work here claimed would take two men about two days upon each job.

In 1959 and 1961 negotiations, the Union tried unsuccessfully to obtain a fabrication clause in their contract. In the 1963 contract they obtained a fabrication clause, which reads in pertinent part:

> "As a primary working condition, it is agreed that all pipe formations, systems, or controls, or component parts thereof, included within the nonpurchase list attached hereto and made a part hereof as Exhibit 1, as amended from time to time as provided in this agreement, shall be fabricated on the job site or in the shop of an Employer within the bargaining unit who is bound by this agreement, except as otherwise mutually agreed upon with relation to any particular job."

The contract also established a fabrication committee composed of representatives of the Union and Association, which committee was to apply, interpret and enforce the fabrication clause. The present controversy arises out of efforts to enforce the fabrication clause on three projects, to wit, Minnesota Mining & Manufacturing (3-M), Aircon, and Upper Midwest Piping. The facts are fully outlined in the Trial Examiner's report and the briefs and will not be set out in detail here. The Trial Examiner, upon the basis of a full evidentiary hearing, substantial evidence and credibility findings as outlined in his report, determined:

> "4. By entering into and maintaining an agreement containing a fabrication clause which, as inter-

preted, construed and applied, requires that packaged boilers prefabricated at plants by employees of employer-manufacturers may be used or installed in construction on the project jobsite only if external piping, controls and attachments of the packaged boiler are fabricated at the jobsite by members of Respondent Local 455, Respondent Local 455 and Respondent St. Paul Association of Plumbing, Heating and Mechanical Contractors, Inc., its Member-Contractors and Respondent Upper Midwest Piping, Incorporated, engaged in unfair labor practices within the meaning of Section 8(e) of the Act.

5. By threatening, coercing and restraining Minnesota Mining & Manufacturing Company with an object of forcing or requiring said Company to enter into agreement prohibited by Section 8(e), and to cease using, selling, handling or otherwise dealing in the products of, or doing business with, Orr & Sembower, Inc., the Respondent Local 455 engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) and (B) of the Act.

6. By threatening, coercing and restraining D. W. Hickey Co., Inc., with an object of forcing or requiring said Company to enter into an agreement prohibited by Section 8(e), and to cease using, selling, handling or otherwise dealing in the products of, or doing business with, Orr & Sembower, Inc., and Minnesota Mining and Manufacturing Company, the Respondent Local 455 engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) and (B) of the Act.

7. By threatening, coercing and restraining Pierre Aircon Company with an object of forcing or requiring said Company to enter into an agreement prohibited by Section 8(e), and to cease using, selling, handling or otherwise dealing in the products of, or doing business with, Orr & Sembower, Inc., the Respondent Local 455 engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) and (B) of the Act.

8. By threatening, coercing and restraining Upper Midwest Piping, Incorporated with an object of forcing or requiring said Company to enter into an agreement prohibited by Section 8(e), and to cease using, selling, handling or otherwise dealing in the products of, or doing business with, Cleaver-Brooks Company and The Heinen Company, its representative, the Respondent Local 455, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) and (B) of the Act."

The Board disagreed with the Examiner's findings and conclusions in almost all respects. It held that none of the parties had violated § 8(e) or § 8(b)(4)(ii)(A) of the Act. It upheld the Examiner's determination that Local 455 had violated § 8(b)(4)(ii)(B) of the Act by reason of threats made to 3-M and Hickey, 3-M's heating contractor, with the object of forcing Hickey to cease doing business with 3-M, and 3-M to cease doing business with the makers of the packaged boilers it had purchased. The § 8(b)(4)(ii)(B) violation is the subject matter of the cross-appeal hereinafter considered.

Case No. 18,106. ABMA's Appeal

ABMA upon its appeal asserts the following errors:

1. By according relevance to the concept of work preservation to validate Local 455's ad hoc agreements, the Board has misconstrued and misapplied Section 8(e) of the Act, and has mistakenly sanctioned Local 455's efforts to resist and thwart technological advancement.

2. The Board committed error by summarily overturning the Examiner's finding that the purpose underlying Local 455's acts was not unit work preservation, and by holding that the construction industry proviso to Section 8(e) protected Local 455's ad hoc agreements.

3. The Board failed in its duty to make a full disposition of the issues in this case, in failing to determine the validity of the fabrication clause as written.

4. The Board erroneously relied upon the concepts of "right of control" and "work preservation" to reach the correct conclusion that Local 455 violated Section 8(b)(4)(ii)(B) of the Act by coercing Hickey and 3-M.

5. The Board erred in concluding that the fining of Aircon did not constitute coercion and restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act.

We shall first give consideration to asserted error No. 3, supra, for the reason that we feel such error is well-taken and that such error may have a substantial bearing upon the Board's decision.

The Board in its opinion flatly states: "Moreover, although the fabrication clause might be read as contemplating that trim piping could be performed in the shop of an employer, the legality of that clause is not here in issue."

The Board found that in the Aircon and 3-M projects the Union referred the dispute under the fabrication clause to the fabrication committee and that the new ad hoc agreements resulted in interpreting the fabrication clause to prohibit installation of packaged boilers at these sites and further found that the ad hoc agreements were designed to serve a lawful primary objective, i. e., to preserve the work of employees covered by the agreement at the job site. The Board's position is thus stated in its brief:

> "When the General Counsel issued the complaint herein, he alleged that Section 8(c) had been violated *not* by the mere execution of the contract containing the Fabrication Clause, but rather by the manner in which the parties 'have interpreted, construed and applied' the Clause. At the hearing, the General Counsel's representative was asked by the attorney for the Association 'whether the language of the Fabrication Clause is *per se* or on its face illegal'. The representative replied, 'we have no contention that the language, limited to the Fabrication

Clause above, is illegal . . . we have no way of knowing whether the Fabrication Clause, when considered in the light of all the items in the Non-Purchase list, is illegal. . . . The General Counsel, however, is prepared to prove that the parties . . . [have] in fact construed, interpreted and applied the Fabrication Clause . . .' in a manner violative of Section 8(e),

"In its decision here, the Board noted these circumstances, and the fact that the *ad hoc* agreements subsequently reached differed in material respects from the terms of the Fabrication Clause itself. In this light, plus the fact that the Fabrication Clause itself expressly contemplated that the parties would be required to negotiate about its application 'to any particular job', we submit that the Board was reasonable in ruling only upon the *ad hoc* agreements and declining to adjudicate the legality of the 1963 Fabrication Clause."

A careful examination of the record satisfies us that the validity of the fabrication clause was fully litigated. The fabrication clause provisions of the contract are set out in full in the complaint. Extensive evidence bearing upon the validity of the clause was received. The Trial Examiner considered the validity of the fabrication clause to be in issue and expressly found that such clause violates § 8(e). The Examiner cites supporting decisions for his conclusion.

In our view, the interpretation and validity of the fabrication clause is a vital issue in this case. The fabrication clause is the foundation upon which the Union's activities complained of rest. The fabrication clause was exhibited by the Union representatives to the property owners who had purchased packaged boilers and was the basis for bringing the owners before the fabrication committee and for forcing the ad hoc agreements relied upon by the Board. Under the ad hoc agreement, 3-M agreed to and did get the manufacturer to remove piping from the boiler. In Aircon, the installation was permitted upon

the payment of $100 into a fund maintained jointly by Local 455 and Association for the purpose of developing more enforcement within the bargaining unit.

Since the fabrication clause was the prime instrumentality that brought about the ad hoc agreements, we do not believe the validity of such agreements can be considered in isolation. If the fabrication clauses as set out in the contract are violative of the Act, their use in coercing the ad hoc agreements would be improper. Moreover, the interpretation of the fabrication clause with respect to whether it preserves work for the Union members in general or for workers at the job site has an important bearing upon the applicability of the construction industry proviso of § 8(e).

Courts as well as the National Labor Relations Board have held that a material issue which has been fairly tried by the parties should be decided by the Board regardless of whether it has been specifically pleaded. *Associated Home Builders* v. *N.L.R.B.*, 9 Cir., 352 F.2d 745, 753-55; *N.L.R.B.* v. *Sterling Furniture*, 9 Cir., 202 F.2d 41; *Frito Co.* v. *N.L.R.B.*, 9 Cir., 330 F.2d 458; *Hughes Tool Co.*, 147 NLRB 1573, 1576-77; *Como Plastics, Inc.*, 143 NLRB 151, 155; *Monroe Feed Store*, 112 NLRB 1336, 1337.

In *Associated Home Builders* v. *N.L.R.B.*, supra, the court summarized and followed the holding in *Frito Co.* v. *N.L.R.B.*, supra, on the point here pertinent, stating:

> "Upon petition for review and modification of the Board's order, the employer contended that the Board should have found invalid the sections of the contract which were not listed in the complaint by the General Counsel. The court noted that the proof in the case had been admitted without objection. It found that the Board under these circumstances 'could render a decision based upon the issues actually tried without ordering amendment, or it could order amendment to conform to proof or conduct further hearings in the premises.' The court took note of

§ 101.10 of the Code of Federal Regulations which provides: 'The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling.' The court said of this (330 F.2d p. 465): 'The provision noted must be taken to mean that the procedure to be followed in hearings before the Board shall be controlled as far as practicable by the Federal Rules of Civil Procedure.' The court then quoted Rule 15, Federal Rules of Civil Procedure. 'When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.' In other words, where evidence is received without objection the pleadings are to be deemed amended. Such was the view the court took of the situation before it and accordingly it remanded the case to the Board for further proceedings dealing with those matters disclosed by the proof admitted without objection. We feel the facts of this case warrant similar treatment." 352 F.2d 745, 754.

We adopt the foregoing as a proper statement of the applicable law.

Article XXI of the contract, which contains the fabrication clause, provides:

"Savings Clause.

"Section 1. If any provision of this Agreement shall by official Governmental authority, order or court decision be declared invalid, then such invalid provisions shall be of no force or effect. In lieu thereof, the parties shall thereafter negotiate a valid provision."

Thus, if the fabrication clause as drafted is invalid, it could afford no legitimate basis for coercing the ad hoc agreements passed upon by the Board.

We hold that the issue of the validity and interpretation of the fabrication clause was fully explored and

litigated before the Examiner and that such issue requires consideration by the Board.

In our view, the Trial Examiner's determination, that the violations charged are established, is based to a considerable extent upon his conclusion that the fabrication clause is illegal. If such clause is in fact illegal, such circumstances would have a direct and important bearing upon whether what Local 455 here did was legitimate work preservation activity.

The issues raised in this case present close and controversial problems of statutory interpretation. Compare *National Woodwork Mfrs. Ass'n* v. *N. L. R. B.*, 7 Cir., 354 F.2d 594, and *N. L. R. B.* v. *Local 11*, 6 Cir., 242 F.2d 932, with *Houston Insulation Contractors Ass'n* v. *N. L. R. B.*, 5 Cir., 357 F.2d 182; *Todd Shipyards Corp.* v. *Shipbuilding Workers, Local 39*, 2 Cir., 344 F.2d 107, 108-09; *N. L. R. B.* v. *Joint Council of Teamsters No. 38*, 9 Cir., 338 F.2d 23, 28; *Meat and Highway Drivers, Local No. 710* v. *N. L. R. B.*, D.C.Cir. 335 F.2d 709, 713-14.

Certiorari has been granted in *National Woodwork Mfrs. Ass'n*, supra, 384 U.S. 968, and helpful guidelines from the Supreme Court upon the troublesome issues here presented may reasonably be anticipated.

When the Board has failed to pass upon a vital issue, the procedure usually adopted is to remand to the Board for determination of such issue and for further proceedings consistent with the views expressed in the appellate opinion. *Houston Insulation Contractors Ass'n*, supra; *Associated Home Builders*, supra, and *Frito Co.*, supra.

The Board's decision and order with respect to the charged § 8(b)(4)(ii)(A) and § 8(e) violations is set aside and vacated and the case is remanded to the Board for a determination of the validity of the fabrication clause and for further proceedings not inconsistent with the views here expressed.

The charged § 8(b) (4) (ii) (B) violations raise some separate and distinct problems. The only such violation before us on ABMA's appeal is with respect to the Aircon incident as set forth in stated error No. 5, supra. The Examiner found Local 455 threatened, coerced and restrained Aircon with the object of forcing Aircon to cease doing business with the boiler manufacturer in violation of § 8(b) (4) (ii) (B). The Board in upsetting the Examiner's determination distinguishes the Union's conduct here with its conduct in the 3M incident, considered hereinafter on the cross-appeal, and states there is a significant difference between the use of strike and threats thereof and the resort to peaceful means of resolving disputes, and observes: "The agreement upon responsible compensation for what the Union contended was a breach of its contract was similarly a peaceful method of resolving its dispute without a strike or threat thereof."

Thus it would appear that the Board's decision on this issue was largely based upon an assumption that the fabrication clause was legal—an issue which it expressly refused to decide.

The Board's decision on the § 8(b) (4) (ii) (B) Aircon violation is vacated and said issue is remanded to the Board for further consideration consistent with the views herein expressed.

Case No. 18,200. Local 455's Appeal.

Local 455 has filed petition for review of the Board's determination upholding the Trial Examiner's finding that Local 455 violated § 8(b) (4) (ii) (B) by making repeated threats to Hickey, the employer, and 3-M, the building owner, to take economic action by refusing to install the packaged boilers with the object of forcing Hickey to cease doing business with 3-M, and to force 3-M to cease doing business with the boiler manufacturer.

The Board found Hickey to be a secondary employer on the basis of its finding that Hickey had no power to select the boiler to be installed. It was properly found that 3-M was not an employer of the employees involved in the dispute and that it was not a party to the labor contract containing the fabrication clause. We believe that the Examiner's findings, upheld by the Board, are supported by substantial evidence and that such findings support the determination that Local 455 has violated § 8 (b) (4) (ii) (B).

The Board's cross-petition for the enforcement of its order with respect to such violation is granted.

SUMMARY

The Board's determination that Local 455 violated § 8 (b) (4) (ii) (B) with respect to the 3-M incident is affirmed and the Board's cross-petition for enforcement of its order with respect thereto is granted.

Upon ABMA's appear, the Board's decision and order with respect to all charged § 8(b) (4) (ii) (A) and § 8(e) violations and with respect to the charged Aircon § 8(b) (4) (ii) (B) violation is vacated and set aside and this case is remanded to the Board with directions to determine the legality of the fabrication clause and for further proceedings consistent with the views expressed in this opinion.

A true copy.

Attest:

/s/ Robert C. Turk
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX F

167 NLRB No. 79

D-182
St. Paul, Minn.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 18-CE-4

UNITED ASSOCIATION PIPE FITTERS LOCAL UNION NO. 455 and UNITED ASSOCIATION PLUMBERS & GASFITTERS LOCAL UNION NO. 34, both affiliated with the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, and ST. PAUL ASSOCIATION OF PLUMBING, HEATING AND MECHANICAL CONTRACTORS, INC., *et al.*

and

Case No. 18-CE-6

UNITED ASSOCIATION PIPE FITTERS LOCAL UNION NO. 455 and UNITED ASSOCIATION PLUMBERS & GASFITTERS LOCAL UNION NO. 34, both affiliated with the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, and UPPER MIDWEST PIPING, INCORPORATED

and

Case No. 18-CC-143

UNITED ASSOCIATION PIPE FITTERS LOCAL UNION NO. 455, affiliated with the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO (D. W. HICKEY CO., INC., and MINNESOTA MINING & MANUFACTURING COMPANY)

and

AMERICAN BOILER MANUFACTURERS ASSOCIATION

SUPPLEMENTAL DECISION AND ORDER

On August 5, 1965, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding, *inter alia*, that (1) no issue was presented concerning the legality, under Section 8(e) of the National Labor Relations Act, as amended, of the fabrication clause in the 1963 collective-bargaining agreements between Respondent Local Union No. 455 and Respondent Employers because the General Counsel had not alleged in the complaint, nor urged at the hearing, that this clause was *per se* unlawful; (2) certain *ad hoc* agreements entered into between Local Union No. 455 and various Respondent Employers construing, interpreting, and applying the fabrication clause were not violative of Section 8(e) of the Act; (3) the conduct of Local Union No. 455 in connection with these *ad hoc* agreements was not violative of Section 8(b)(4)(A); and (4) Local Union No. 455 violated Section 8(b)(4)(ii)(B) by its conduct on one project, but did not violate Section 8(b)(4)(B) in any other respect.[2]

On October 6, 1966, the United States Court of Appeals for the Eighth Circuit issued its opinion[3] in which it affirmed the Board's findings of Section 8(b)(4)(ii)(B) violations at the one project, but vacated and set aside the Board's findings that there were no Section 8(e) or Section 8(b)(4)(A) violations and that the Respondent Union did not violate Section 8(b)(4)(ii)(B) by its conduct in the Pierre Aircon Company incident. The Court remanded the case to the Board with directions to determine the legality of the fabrication clause, an issue which the Court held had been fully litigated; to reexamine, in the light of such determination, the issues appealed to the

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[1] 154 NLRB 285, Member Fanning concurring in part, Member Brown dissenting in part.

[2] No review was sought of the Board's disposition of other issues.

[3] 366 F.2d 815.

Court by the Charging Party; and for further proceedings consistent with the views expressed in the Court's opinion. In connection with the issues remanded, the Court noted in its opinion that "Certiorari has been granted in *National Woodwork Mfrs. Ass'n, supra,* 384 U. S. 968, and helpful guidelines from the Supreme Court upon the troublesome issues here presented may reasonably be anticipated."

The Board has reconsidered its original Decision and Order with respect to the issues remanded in the light of the opinion of the Court of Appeals and the opinion of the Supreme Court in *National Woodwork Manufacturers Association et al.* v. *National Labor Relations Board,* 386 U. S. 612. The Supreme Court in that case held that "just as . . . Section 8(b)(4)(B) did not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, Section 8(e) does not prohibit agreements made and maintained for that purpose." The Supreme Court accordingly found the "will not handle" clause in a contract between the Carpenters Union and employer Frouge not violative of Section 8(e), and the refusal of that union to permit carpenters employed by Frouge to handle prefitted doors manufactured by the charging party not violative of Section 8(b)(4)(B), and stated in its opinion that the determination whether such a clause and its enforcement violated those sections—

> . . . cannot be made without an inquiry into whether under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this

> category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. [Footnotes omitted.]

The Supreme Court indicated that the circumstances to be considered, in determining the union's objective, might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry.

The Supreme Court, in a companion case issued the same day,[4] summarized its holding in *National Woodwork* as follows:

> National Woodwork Mfgrs., ante, holds that collective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity.

With these Supreme Court rulings in mind, we turn to the issues remanded herein.

1. *The fabrication clause*

This clause, as incorporated in the 1963 agreement between Local Union No. 455 and the Contractors Association, provided as follows:

> As a primary working condition, it is agreed that all pipe formations, systems, or controls, or component parts thereof, included within the nonpurchase list attached hereto and made a part hereof as Exhibit I, as amended from time to time as provided in this

[4] *Houston Insulation Contractors Association* v. *National Labor Relations Board*, 386 U.S. 664, (April 17, 1967).

> agreement, shall be fabricated on the job site or in the shop of an Employer within the bargaining unit who is bound by this agreement, except as otherwise mutually agreed upon with relation to any particular job.

The agreement also established a fabrication committee, composed of representatives of Local Union No. 455 and the Contractors Association, to apply, interpret, and enforce the fabrication clause.

As directed by the Court of Appeals, we have considered this clause on the basis of the entire record herein and in the light of the guidelines established by the Supreme Court, and find that the clause was not violative of Section 8(e) of the Act as its object was to preserve for employees in the unit work traditionally done by such employees, who are represented by Local Union No. 455, not for members of the Union generally nor to satisfy union objectives elsewhere. The clause, as set forth above, provided, "As a primary working condition," that the fabrication work of attaching trim piping was to be done "on the job site or in the shop of an Employer within the bargaining unit who is bound by this agreement." The clause therefore applied only to work performed by employees of employers who were in the contractual multi-employer unit, and employees whose employers had agreed to this clause in their individual contracts with Local Union No. 455. Moreover, the record establishes that the work of attaching trim piping to boilers had traditionally been performed by employees in such units represented by Local Union No. 455; that the advent of packaged boilers had a direct impact on the amount of such work available to them; and that the Union's sole objective in obtaining agreement to the fabrication clause was to preserve and to reacquire such work for the unit employees of the contracting employers. It is apparent, therefore, under the tests laid down by the Supreme Court, that the clause met the "touchstone" of being "ad-

dressed to the labor relations of the contracting employer *vis-a-vis* his own employees," and that the evidence does not show that the "tactical object" of the clause was the packaged-boiler manufacturers or any other secondary employers. Accordingly, we conclude that the fabrication clause was a primary work-preservation clause, and therefore outside the scope of Section 8(e) of the Act.[5]

2. *The ad hoc agreements applying the fabrication clause.*

A. *The 3-M incident.* Minnesota Mining and Manufacturing Company, herein called 3-M, ordered 3 packaged boilers from the manufacturer, and engaged D. W. Hickey Co., Inc., a member of the Contractors Association, to install the boilers in a building which 3-M was remodeling. Thereafter, Mooney, a business representative of Local Union No. 455, informed Hickey and 3-M, in effect, that the packaged boilers were a violation of the fabrication clause and his men would not install them. On August 27, 1963, the members of the fabrication committee, established to carry out the terms of the fabrication clause, agreed that Hickey's contract with 3-M to install the packaged boilers was a violation of the fabrication clause and work on this building would cease unless the packaged-boiler problem was resolved.

(1) *The alleged violation of Section 8(e).* As the Board found in its original decision, the members of the fabrication committee on August 27 entered into a new *ad hoc* agreement to which Local Union No. 455, the Contractors Association, and Hickey (by virtue of its membership in the Association) were parties, to the effect that the installation of the packaged boilers in this building was prohibited by the fabrication clause. We have found above

[5] The fact that the fabrication clause might be read as contemplating that trim-piping work could be performed by unit employees in the shop of a signatory employer does not change its primary nature. See *Houston Insulation, supra.*

that the fabrication clause was a lawful clause designed to preserve and reacquire trim-piping work traditionally performed by employees in the Contractors Association unit. To the extent that the *ad hoc* agreement had the same lawful object as the fabrication clause, it was under the guidelines established by the Supreme Court, a primary work-preservation agreement outside the scope of Section 8(e). We note, however, that neither the Contractors Association nor any of its members, including Hickey, which contracted merely to install packaged boilers ordered by 3-M, was in a position to assign the trim-piping work at this project. Even if, in these circumstances, the Contractors Association and Hickey were regarded as secondary employers, and the August 27 *ad hoc* agreement as a "hot goods" agreement within the scope of Section 8(e), because these employers had no control over the assignment of the work,[6] we would find, nevertheless, that as the trim-piping work in dispute was to be performed at the site of the construction, the August 27 agreement was protected by the construction industry proviso to Section 8(e), and was therefore lawful.

(2) *The alleged violation of Section 8(b)(4)(A).* In view of our finding that the August 27 *ad hoc* agreement was not prohibited by Section 8(e), we affirm the finding in our original decision that Local Union No. 455 did not violate Section 8(b)(4)(A) by this conduct.[7]

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[6] Three-M, which ordered the packaged boilers, is not a member of the Contractors Association, was not named in the complaint as a respondent, and no agreement between it and Local Union No. 455 is alleged as a violation of Section 8(e). In its decision in *National Woodwork, supra* footnote 15, the Supreme Court stated that the Board's "right of control" test was not before the Court in that case.

[7] See *Northeastern Indiana Building and Construction Trades Council (Centlivre Village-Apartments)*, 148 NLRB 854, reversed and remanded on other grounds, 352 F.2d 696 (C.A.D.C.).

(B) *The Pierre Aircon incident.* The fabrication committee required Pierre Aircon Company, on October 22, 1963, to pay $100 for violating the fabrication clause by "entering into a contract . . . with the Deluxe Check Company for the installation of a . . . boiler [which] arrived with the trim on." Pierre Aircon Company paid the $100 and installed the packaged boiler in the Deluxe Check Building.

(1) *The alleged violation of Section 8(e).* As the original Board decision found, the fabrication committee's action on October 22 constituted the entering into of a new *ad hoc* agreement between Local Union No. 455 and the Contractors Association (of which Pierre Aircon Company was a member) to the effect that the installation of the packaged boiler at this site constituted a violation of the fabrication clause.

We have found above that the object of the fabrication clause was to preserve and reacquire trim-piping work traditionally performed by employees in the unit. The *ad hoc* agreement of October 22 was therefore an interpretation and application of a lawful clause, and had the same lawful objective. Pierre Aircon Company was a signatory to the 1963 contract, its employees were in the Contractors Association unit, and, as members of Local Union No. 455, had traditionally performed trim-piping work. We therefore find that the October 22 *ad hoc* agreement was a primary work preservation agreement outside the scope of Section 8(e).[8]

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[8] Unlike the 3-M incident, the record does not show who ordered the packaged boiler to be installed at this project. The evidence therefore does not establish that Pierre Aircon had no control over the work, and therefore was a secondary employer. See footnote 6, *supra.* In these circumstances, we find it unnecessary to deal with the alternative finding, in the Board's original decision, that this *ad hoc* agreement, to the extent that it fell within the scope of Section 8(e), was protected by the construction industry proviso thereto.

(2) *The alleged violation of Section 8(b)(4)(ii)(A).* As we have found that the October 22 agreement was lawful, and as there is no evidence that Local Union No. 455 sought any agreement other than the one reached, we find that its conduct in securing this *ad hoc* agreement was not violative of Section 8(b)(4)(ii)(A).

(3) *The alleged violation of Section 8(b)(4)(ii)(B).* The Board in its original decision found that the fabrication committee's requirement of reasonable compensation by Pierre Aircon Company for its breach of contract constituted a peaceful method of resolving this dispute, and, therefore, that Local Union No. 455 did not threaten, coerce or restrain employers by its conduct in connection with this project within the meaning of subsection (ii) of Section 8(b)(4). We have again considered this matter and are of the same view. Moreover, even if the fine were considered coercive, it was directed toward Pierre Aircon, which was the primary employer as far as the record shows, and was for the purpose of preserving unit work. It therefore was not prohibited by Section 8(b)(4)(B).

B. *The Upper Midwest Piping incident.* Upper Midwest Piping, Incorporated, a number of Mechanical Contractors Association of Minneapolis, Inc., had a collective-bargaining agreement with Local Union No. 539, a sister local of Local Union No. 455, which agreement contained a fabrication clause similar to the one in the Local Union No. 455 agreement. Although both the Minneapolis and St. Paul agreements contained reciprocal clauses covering employer-members working in either area, when Upper Midwest Piping obtained a contract to install two packaged boilers in a school in St. Paul, it signed the Local Union No. 455 agreement. On September 9, 1963, Upper Midwest Piping ordered two boilers of the type specified in its contract through Heinen Company, the manufacturer's agent in St. Paul. Early in October, business representative Mooney told Sorsensen, vice president of Upper Midwest Piping, that, under the fabrication clause, "the

trim piping and the gas train, etc. shouldn't be on these boilers when they came in," and that it was "our work." Mooney testified as to this conversration that: "Mr. Sorensen isn't the kind of man that you have to come up with a threat . . . . Merely a matter of explaining to him what the labor agreement was all about." Shortly after this conversation, Sorensen instructed Heinen not to deliver the boilers at the jobsite with the trim piping attached. Although Heinen passed Sorensen's instructions along to the manufacturer, the boilers were delivered in packaged form and were being installed at the time of the hearing by Upper Midwest Piping employees who were members of Local Union No. 539.

(1) *The alleged Section 8(e) violation.* In its original decision, the Board found it unnecessary to determine whether Local Union No. 455 and Upper Midwest Piping, by the above conduct, entered into an *ad hoc* agreement interpreting the fabrication clause, because such agreement would, in any event, be protected by the construction industry proviso to Section 8(e) of the Act.[9] However, the Supreme Court held in *Houston Insulation, supra,* that a union's conduct toward a primary employer does not become secondary because such conduct is for the benefit of employees represented by a sister local. We find, therefore, on reconsideration of this matter, that it is not necessary to consider the impact of the construction industry proviso because any agreement that might have been entered into would have been primary. As Upper Midwest Piping was signatory to contracts with both locals, the fabrication clauses in both were substantially identical, and the object of both was the preservation of traditional unit work,[10] Upper Midwest Piping

[9] See, also, footnote 16 of the Board's original Decision and Order.

[10] See the Board's finding with regard to the fabrication clause in the Local Union No. 539 contract in the companion case, *United Association Pipe Fitters Local Union No. 539 et al. (American Boiler Manufacturers Association),* 167 NLRB No. 80.

was the primary employer, whether Local Union No. 455's object was the company's labor relations with members of Local Union No. 455 or of those of its sister Local Union No. 539.

2. *The alleged Section 8(b)(4)(ii)(A) violation.* As the *ad hoc* agreement, if any, would not have been unlawful, we find that the conduct of Local Union No. 455 to achieve such an agreement was not violative of Section 8(b) (4) (ii) (A).

Accordingly, we conclude, upon reconsideration of all the issues remanded by the Court of Appeals, that the fabrication clause was lawful, and that the Board's original dismissal of the complaint with regard to the other issues remanded should be, and hereby is, affirmed.

Dated, Washington, D. C.

Frank W. McCulloch, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX G

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. . . .

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to

make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

* * * *